United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1903.

No. 1310.

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ELLWOOD O. WAGENHURST, JOHN E. REYBURN, AND JOHN K. LITTLE, APPELLANTS,

vs.

ELIAS WINELAND.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 27, 1903.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 27, 1903.

In the Court of Appeals of the District of Columbia

ELLWOOD O. WAGENHURST ET AL., Appellants,
vs.
ELIAS WINELAND. } No. 1310.

a Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, Treasurer of the United States of America and *ex Officio* Commissioner of the Sinking Fund of the District of Columbia; John E. Reyburn, John K. Little, and Robert M. Moore, Defendants. } No. 23352. Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill, &c.*

Filed June 7, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, Treasurer of the United States of America and *ex Officio* Commissioner of the Sinking Fund of the District of Columbia; John E. Reyburn, John K. Little, and Robert M. Moore. } Equity. No. 23352, Docket No. 52.

The bill of complaint of Elias Wineland against Ellwood O. Wagenhurst and others in chancery exhibited.

Your complainant respectfully states as follows:

1. That your complainant is a citizen of the United States of America, and a resident of the city of Philadelphia, in the State of Pennsylvania, and sues in his own right.

2. That the defendants are also citizens of the United States of America, and the defendants Ellwood O. Wagenhurst and Ellis H. Roberts are residents of the District of Columbia. The defendant Ellwood O. Wagenhurst is sued in his own right, and the defendant Ellis H. Roberts is sued as the Treasurer of the United States of America, and *ex officio* commissioner of the sinking fund of the District of Columbia. The defendants John E. Reyburn and
2 John K. Little are residents of the city of Philadelphia, in the State of Pennsylvania, and are sued in their own rights, as hereinafter more fully set forth. The defendant Robert M. Moore is a resident of the city of Havana, in the island of Cuba, as your complainant is informed and believes, and is sued in his own right.

3. That heretofore one Robert M. Moore and the defendant Ellwood O. Wagenhurst as co-partners trading under the firm name of R. M. Moore and Company, commonly written "R. M. Moore & Co.," entered into two certain contracts with the District of Columbia, being contracts Nos. 2361 and 2390, dated October 20, 1896, and May 19, 1897, respectively, for laying certain sewers, which said contracts were by them completed on June 2, 1897, and May 11, 1898, respectively.

4. That under and by virtue of said contracts ten per centum (10 %) of each payment for work done thereunder by the said firm was retained as security additional to the contractor's bond as a guarantee fund to keep such work in repair for the full term of five (5) years from the completion of said contracts, and, accordingly, from said contract No. 2361 the sum of $1,517.37 in all was retained, from which two deductions, amounting in all to $22.50, were made, leaving a net balance of $1,494.87 to the credit of said contract on December 21, 1898; and from said contract No. 2390 the total sum of $1,609.31 was retained, from which no deductions were made, thus leaving a net balance of $1,609.31 to the credit of said contract on December 21, 1898; all of which will more fully appear by reference to a certain letter attached and filed herewith as part
3 hereof and marked "Complainant's Exhibit E. W. No. 1," the same being a true copy.

5. That said retained moneys were duly deposited with the Treasurer of the United States of America, as *ex-officio* commissioner of the sinking fund of the District of Columbia, and were by him lawfully invested in United States interest-bearing bonds to the extent of $3,077.31, the balance remaining in cash uninvested, and said investments were made on various dates prior to December 21, 1898, and have ever since remained and still remain in full force and effect, as will more fully appear by reference to the "Complainant's Exhibit E. W. No. 1," referred to in paragraph 4 of this bill of complaint.

6. That long prior to December 21, 1898, all ownership and interest of the defendant Ellwood O. Wagenhurst in said retained monies, and the bonds in which the same were invested, and the interest to be yielded by said bonds, wholly ceased by reason of his sale and assignment of his entire interest and ownership therein

and thereto, and he has never since had any right, title, or interest whatever in the same, nor any right whatever to interfere therewith. His said sale and assignment were made to his co-defendant Robert M. Moore, so your complainant is informed.

7. That the whole of said retained monies, bonds and interest were duly granted, bargained, sold, transferred, assigned, and set over, absolutely and without any limitation, condition, or reservation whatever, to your complainant by the said R. M. Moore & Co. by the said Robert M. Moore, as the senior partner of said firm and *sole owner* of the said retained monies, by a certain instrument of
4 writing (predicated of a valuable and adequate consideration hereinafter more fully set forth) dated December 21, 1898, and duly recorded on December 21, 1898, in Liber No. 2347, folio 331 *et seq.*, one of the land records of the District of Columbia, a copy of which instrument is attached and filed herewith as part hereof and marked "Complainant's Exhibit E. W. No. 2."

8. That at the same time two certain special interest powers of attorney were executed and delivered to your complainant, predicated of a valuable and adequate consideration, both dated December 21, 1898, and executed as aforesaid, whereby your complainant was duly authorized to receive and give full discharge for all interest then due or thereafter to become due on said bonds, and copies of said powers of attorney are attached and filed herewith as part hereof and marked "Complainant's Exhibit E. W. No. 3" and "Complainant's Exhibit E. W. No. 4."

9. That said sale and transfer or assignment of said retained monies, bonds and interest were duly notified to the defendant Ellis H. Roberts, as Treasurer and commissioner, as aforesaid, on or about December 21, 1898, and the said powers of attorney were duly sent to and received and filed by him in his office on or about the same date, as will more fully appear by reference to copies of two certain letters attached and filed herewith as part hereof and marked "Complainant's Exhibit E. W. No. 5" and "Complainant's Exhibit E. W. No. 6."

10. That under and by virtue of the aforesaid instruments and the premises the whole of the said retained monies are now and ever since December 21, 1898, have been the sole and absolute
5 property of your complainant, wholly free from all claims of the said Robert M. Moore and Ellwood O. Wagenhurst and all persons whomsoever claiming or to claim through or under them, and since said last mentioned date all interest yielded by said bonds was until July, 1900, promptly paid over to your complainant by the defendant Ellis H. Roberts, with the knowledge, acquiescence, and consent of the said Robert M. Moore and the other defendants hereto.

11. That at no time whatever until August 1900, was any principal or interest of said bonds ever paid to or claimed of record (except as hereinafter stated) by any person or persons whomsoever claiming through or under the said Ellwood O. Wagenhurst, or the said Robert M. Moore, or both of them (except as hereinafter stated), but the acts of the said Robert M. Moore, as the *senior* partner of

said firm and the *sole owner* of the said assets, in regard to the said retained monies, bonds, and interest, were never questioned of record until July and August, 1900.

12. That as matter of law and legal right the said Robert M. Moore had full power and authority to sell and assign the whole of the said retained monies, bonds, and interest to your complainant, and the said Robert M. Moore likewise had full right and authority to execute and deliver, as aforesaid, the said several instruments of writing hereinbefore stated to have been executed and delivered by him; and said instruments and the premises were and are operative and effectual to transfer to and vest in your complainant the absolute title and ownership of the whole of the said monies, bonds, and interest.

13. That notwithstanding the premises the defendant Ellwood O. Wagenhurst, on or about July 18, 1900, arbitrarily and
6 without any right or authority whatever in the premises, and in wilful violation and fraud of the absolute right, title, interest, and ownership of your complainant, as aforesaid, and with intent to coerce the said Robert M. Moore into the performance of some alleged, unknown, and undisclosed personal and private agreement between the said Robert M. Moore and Ellwood O. Wagenhurst having no relation or reference whatever to the said retained monies, bonds, and interest, wrote and sent to the said Treasurer and commissioner a certain letter, which said Treasurer and commissioner duly received, wherein and whereby the said Ellwood O. Wagenhurst, "as a partner in said firm" of R. M. Moore & Co., directed the said Treasurer and commissioner that no further monies as interest or principal of the said retained fund on account of the said contracts Nos. 2361 and 2390 with the District of Columbia be paid for account of said R. M. Moore & Co. until further notice from him, of which letter a true copy is now made part hereof, and marked "Complainant's Exhibit E. W. No. $6\frac{1}{2}$."

14. That in consequence of the said letter the said Treasurer and commissioner, on or about July 19, 1900, addressed a certain letter to your complainant, which letter your complainant duly received, whereby the said Treasurer and commissioner advised your complainant of the receipt by him and purport of the said letter of the said Ellwood O. Wagenhurst, and that in view of the said letter the checks for interest on said bonds will for the present be retained in the office of the said Treasurer and commissioner, as will more fully appear by reference to the said letter, attached and filed herewith as part hereof, and marked "Complainant's Exhibit E. W. No. 7," the same being a true copy.

7 15. That, in accordance with the practice and procedure of said office, the said Treasurer and commissioner declines and will continue to decline to pay over either the said interest or principal of said bonds and monies to your complainant until the said letter of the said Ellwood O. Wagenhurst and the two letters hereinafter referred to be withdrawn or he and his co-defendants, John E. Reyburn and John K. Little, be enjoined by a court of competent juris-

diction from interfering with the said monies, bonds, and interest, as the said Treasurer and commissioner will not undertake to decide conflicting claims to said monies, bonds, and interest in his hands, leaving these matters to the parties or the courts to settle.

16. That the aforesaid acts of the said Ellwood O. Wagenhurst and the hereinafter mentioned acts of his co-defendants, John E. Reyburn and John K. Little, have constituted and still constitute gross, wilful, and most arbitrary interference with and a fraud upon the aforesaid property rights of your complainant in and to the said monies, bonds, and interest, and have caused and will continue to cause great loss and injury to your complainant, against which your complainant is entitled to be relieved by the decree of this court.

17. That in and by the said letter of the said Ellwood O. Wagenhurst to the Treasurer and commissioner he signs and describes himself as "formerly" of the firm of R. M. Moore & Co.; that the said Ellwood O. Wagenhurst has been requested by your complainant's counsel to withdraw his said letter, but he has refused and still refuses so to do, although he has expressly admitted to
8 your complainant's counsel that he has no beneficial right, title, interest, ownership, claim, or demand in or to the said monies, bonds, and interest, but that his purpose and intent in writing said letter was to coerce your complainant and said Robert M. Moore.

18. That on and prior to December 21, 1898, the said Ellwood O. Wagenhurst had never reacquired any beneficial ownership or interest whatever in or to the said monies, bonds, and interest after he had entirely parted therewith as aforesaid, nor did your complainant otherwise, either directly or indirectly, have any prior actual or constructive notice or knowledge whatever of any beneficial ownership, claim, or interest of the said Ellwood O. Wagenhurst in or to the said monies, bonds and interest, but his knowledge and information was and still is entirely to the contrary, and no such ownership, claim, or interest in fact has ever existed since long prior to December 21, 1898.

19. That on December 21, 1898, the said records in the said offices and elsewhere also wholly failed to show that any person whosoever other than the said R. M. Moore & Co. or Robert M. Moore had any ownership, claim, or interest in the said monies, bonds and interest, except only one Samuel F. Merrill, whose claims were fully satisfied by your complainant and released to the said R. M. Moore & Co. before the said sale and transfer to your complainant were made; nor did your complainant otherwise, either directly or indirectly, have any prior actual or constructive notice or knowledge whatever of any ownership, claim, or interest in the said monies, bonds, and interest of any person or persons whomsoever, except only as aforesaid.

9 20. That since December 21, 1898, to the present time no claim or demand to or for the said monies, bonds and interest has ever been made and filed of record in any of the said offices, with the exception of the said letter of the said Ellwood O. Wagen-

hurst and two certain letters from the defendants John E. Reyburn and John K. Little, as hereinafter more fully referred to, nor was there any interference whatever by anybody with the payment of the interest of the said bonds to the said Samuel F. Merrill while he was interested in the said monies and bonds, nor has there ever been any interference whatever by anybody with the payment of the said interest to your complainant since December 21, 1898, until the aforesaid acts of the said Ellwood O. Wagenhurst were committed.

21. That all of the aforesaid instruments of writing referred to in paragraphs 7 and 8 of this bill of complaint are still in full force and effect, and have ever been in full force and effect since their execution and delivery to your complainant on December 21, 1898, and — the whole of the said retained monies, bonds, and interest your complainant has been ever since December 21, 1898, and still is the sole and absolute owner in his own right and is an innocent purchaser thereof for full value and without notice.

22. That at the time of the aforesaid sale and transfer of the said monies, bonds and interest to your complainant an indemnity bond was executed and delivered to your complainant by the said R. M. Moore & Co., and Robert M. Moore, with Kate C. Moore and Adam McCandlish as sureties, conditioned that if the said retained monies, and all accruing interest on the investments thereof shall be paid
10 in full by the Treasurer of the United States to the said Elias Wineland, his executors, administrators, and assigns, when due and payable by the terms of the said contracts Nos. 2361 and 2390 and by law, then the said obligation to be void and of no effect; otherwise to be and remain in full force and effect; a true copy of which said bond is attached and filed herewith as part hereof and marked "Complainant's Exhibit E. W. No. 8." The said principals and sureties are wholly insolvent.

23. That the defendant Ellwood O. Wagenhurst is insolvent, as are also all of the other defendants to this bill except Ellis H. Roberts, and your complainant has no remedy at law, and is therefore entitled to the aid of this court in the premises.

24. That, as your complainant is informed and believes, by and through the machinations of the defendant Ellwood O. Wagenhurst, the defendants John E. Reyburn and John K. Little have also each written and forwarded to the defendant Ellis H. Roberts a letter dated subsequently to August 1, 1900, in which letter of the said John E. Reyburn he advised the said Ellis H. Roberts that he, the said John E. Reyburn, held an assignment from the said R. M. Moore & Co. of the retention from the said contract No. 2361, and in which letter of the said John K. Little he, the said John K. Little, advised the said Ellis H. Roberts that he, the said John K. Little, claimed the said retention from the said contract No. 2390, as will more fully appear by reference to a copy of a letter of inquiry, dated October 18, 1900, addressed to the said Ellis H. Roberts by your complainant's solicitor herein, and the answer of the said Ellis H.
11 Roberts to the said letter of inquiry, the said copy of the said letter of inquiry being hereto attached and filed herewith as

part hereof and marked "Complainant's Exhibit E. W. No. 9," and a copy of the said answer thereto being also attached hereto and made part hereof and marked "Complainant's Exhibit E. W. No. 10;" and that of the aforesaid letters of the said John E. Reyburn and John K. Little to the said Ellis H. Roberts your complainant has no certified copies.

25. That their said letters conveyed to the said Treasurer and commissioner the first and only notice which he or his predecessors in office ever had of their claims to the said retentions, although, so your complainant avers, the matters and things of which their said letters are predicated arose long prior to December 21, 1898.

26. That at the time the matters and things of which their said claims are predicated arose and long afterwards it was the established rule, practice, and custom of the Treasury Department and of the Treasurer and commissioner of the sinking fund of the District of Columbia to receive and record, in records specially kept for that purpose, all assignments and other instruments and matters and things in any manner affecting retentions under public contracts, and especially the interest thereon, of which rule, practice and custom the defendants had due notice; yet neither the said defendant John E. Reyburn, nor John K. Little, ever presented his said claim for record thereto, therein, or therewith or elsewhere, nor was either of the said claims ever recorded therein or therewith or elsewhere, nor was either of the said claims ever even notified thereto until after August 1, 1900.

12 27. That your complainant never even so much as heard of the said claim of the said John E. Reyburn until the summer of the year 1900, nor of the claim of the said John K. Little until some time after December 21, 1898, and he had no possible means at hand of acquiring any notice thereof on or prior to December 21, 1898, although he exercised the most complete care and caution in the premises and exhausted all means then within his power of ascertaining the exact status of the said retentions before he purchased them.

28. That no interest on said bonds was ever claimed by or paid to the defendants, Ellwood O. Wagenhurst, John E. Reyburn, or John K. Little, or either of them, although they and each of them had due notice that the said retentions were invested in interest-bearing bonds, and that said interest was being duly paid quarterly to the person entitled thereto on the books of the Treasurer.

29. That of the exact nature and extent of the said claims of the said defendants, John E. Reyburn and John K. Little, your complainant has no personal knowledge. As to what, if any, consideration existed for said claims or whether the same had or have any force or effect between the parties thereto, your complainant has no knowledge; but at all events the same were and are of no effect or validity as against the United States or the said Treasurer and commissioner, except at its and his sole option, and neither it nor he ever recognized or acted upon the same, but did promptly recognize and continually act upon the claims and rights of your complainant

so created as aforesaid; nor are the same of any effect or validity as against your complainant.

13 30. That as to what disposition has been made of the evidences of the claims of the said John E. Reyburn and John K. Little your complainant has no knowledge, information or belief; but your complainant avers that in order to render them of any effect or validity as against him, or any other innocent purchaser for value without notice, it was the absolute and imperative duty of the said John E. Reyburn and John K. Little to duly notify the same to the Treasurer and commissioner, and to duly record the same as required by rule, practice, custom, and law, in both of which respects the said John E. Reyburn and John K. Little wholly failed until August, 1900.

31. That by reason of the premises, and particularly of the fact that your complainant was an innocent purchaser for full value and without notice of the said retentions, and of the fact that both the said John E. Reyburn and John K. Little wholly failed and neglected to notify their said claims to the said Treasurer and commissioner, until August, 1900, and to duly record them, and of the further fact that the said Ellwood O. Wagenhurst has no ownership, right, title, or interest whatever therein, the said defendants and each of them, and especially the defendants John E. Reyburn and John K. Little, are and is wholly estopped to assert or maintain their said claims against your complainant.

32. That the said monies, bonds, and interest are held by the said Treasurer and commissioner as a trustee, and in trust for the sole benefit and advantage of your complainant, subject only to the rights of the public therein, as provided by law and the said contracts.

14 33. That all of the defendants hereto, so your complainant alleges upon information and belief, are insolvent, except Ellis H. Roberts.

34. That no persons whosoever claim or assert any beneficial interest whatever in the said retentions as against your complainant, except only the defendants John E. Reyburn and John K. Little, both of whom are fully estopped by their neglect, acquiescence, and laches, as aforesaid.

35. That at the time of the said sale and assignment to your complainant he had no knowledge, notice, information or belief that the said firm of R. M. Moore & Co. had ever been dissolved voluntarily or involuntarily, but, on the contrary, he then *bona fide* believed that the said firm had not been dissolved; but just prior to July 18, 1900, the defendant Ellwood O. Wagenhurst informed your complainant's solicitor that the said firm had been dissolved voluntarily in September 1897, and by the retirement of the said Wagenhurst therefrom, yet on July 18, 1900, the said Wagenhurst addressed the letter to the said Treasurer referred to in paragraph 13 of this bill of complaint, in which he expressly assumes the then existence of said firm, and says: "I hereby *direct as a partner in said firm* that no further monies out of said retained sums (under contracts Nos. 2361

and 2390 between *the firm* of R. M. Moore & Co. and the District of Columbia) or securities be paid out as interest or principal on account of R. M. Moore & Co. *until further notice from me;*" but even after he wrote the said letter of July 18, 1900, the said Wagenhurst reiterated his former statement to the effect that the

15 firm of R. M. Moore & Co., had been voluntarily, and by mutual consent of the partners, dissolved in September 1897, and that he, the said Wagenhurst, had then retired therefrom. Your complainant is unable to state as a fact whether the alleged dissolution occurred or not; but, even if it did in fact so occur, your complainant avers that such fact cannot be asserted nor relied upon as against him by the defendants, for that, as hereinbefore stated, your complainant had no knowledge, notice, information or belief as to such dissolution, at the time of the said sale and assignment to your complainant on December 21, 1898.

36. Your complainant further charges that he does not personally know any of the defendants hereto, nor has he ever seen any one of them. In November, 1898, your complainant's attorney, Thomas M. Fields, informed your complainant that the defendant Robert M. Moore, the senior member of the firm of R. M. Moore and Company, had approached him for the purpose of selling and assigning the moneys retained under contracts Nos. 2361 and 2390 hereinbefore mentioned. The provisions of the said contracts and of the statutes under which the said moneys were retained were explained to your complainant by his said attorney. Your complainant knew nothing about such matters or the contractors, as your complainant had never before purchased moneys retained under public contracts. The said contracts then had some years to run, and there was danger at all times until maturity of partial or of total loss of the retained moneys from breakage of the sewers, defective work and required repairs. Your complainant finally directed his said attorney to advise the said Robert M. Moore as R. M. Moore & Co. that your complainant

16 would pay $2000.00 cash for the said retained moneys in view of the said contingency of loss, provided that your complainant should receive a good title to the said moneys clear of all claims except those of the Government. In December, 1898, your complainant was advised by his said attorney that the said Robert M. Moore as R. M Moore & Co. had accepted your complainant's said offer. Your complainant then on December 19, 1898, sent to his said attorney his check for $2000.00 to close the matter, and shortly afterwards received from his said attorney various papers showing that on December 21, 1898, the transaction had been entirely closed, the retained moneys and interest thereon assigned to your complainant, and the said $2000.00 paid in full in cash to the said R. M. Moore & Co. Thereafter and until July 19, 1900, your complainant regularly received from the United States Treasurer the checks for interest arising from the investments of the said retained moneys, which checks your complainant indorsed in the name of the said firm of R. M. Moore & Co., and collected. Both before and after your complainant's said purchase on December 21,

1898, your complainant never had the slightest knowledge, information or belief that there was any defect in his title or ownership of the said retained moneys until on or about July 20, 1900. except that on or about March 19, 1899, your complainant learned in part of a claim thereto asserted by the defendant John K. Little; nor did your complainant ever have any notice, knowledge, information or belief whatever that the said firm of R. M. Moore & Co. had been dissolved prior to your complainant's said purchase and until August 1900, but the knowledge, information and belief of your complainant was wholly to the contrary, namely, that the said firm had not
17 been dissolved. In addition to the said $2000.00 cash which your complainant paid as aforesaid on December 21, 1898, for the said retained moneys your complainant has also paid in connection therewith the additional sum of not less than $250.00. Your complainant's said purchase of the said retained moneys and all of his acts in the premises have been frank, and open, and in the utmost good faith, and without the least notice prior to and down to the time of his said purchase of any rights or claims of any of the defendants to the said moneys, except, of course, those of the said firm of R. M. Moore & Co. and of the said Robert M. Moore. Your complainant caused the most rigid search in the premises to be made by his said attorney, and there has been no lack of caution or diligence on his part or that of your complainant in this matter. The said purchase price which your complainant paid for the said retained moneys was full, adequate, fair and reasonable under the contingencies above mentioned.

37. Your complainant further charges and avers that the said attorney first met the said Robert M. Moore of the firm of R. M. Moore & Co. in the early part of the year 1898, but never met the defendant Ellwood O. Wagenhurst until the summer of the year 1900. Your complainant's said attorney does not personally know and has never seen either the defendant John E. Reyburn or the defendant John K. Little. Your complainant's said attorney had been known to your complainant for some years prior to the year 1898. Your complainant further charges that in November, 1898, the defendant Robert M. Moore called on your complainant's
18 said attorney and offered for sale the moneys of the said R. M. Moore & Co., retained under their said contracts Nos. 2361 and 2390. Your complainant's said attorney then questioned the said Robert M. Moore about the details of the matters, about the partner Ellwood O. Wagenhurst, his interest in the said moneys, the interest thereon, deductions therefrom, assignments thereof, and the affairs of the firm generally. The said Moore then informed said attorney that the said firm had never been dissolved, but, on the contrary, was still in existence, unless the said Wagenhurst had died. The said Moore also then stated to said attorney that said Wagenhurst had previously gone to his former home in Philadelphia, and from there had gone to some part of Mexico unknown to the said Moore, and that the said Moore had neither seen nor heard of or from the said Wagenhurst for more than one year, and said

Moore did not know whether said Wagenhurst was alive or dead. Said Moore also stated that he had previously bought out said Wagenhurst's interest in all the said moneys retained under said contracts Nos. 2361 and 2390, and had paid him in full in cash therefor, but that this transaction was in parol. Said Moore also then asserted that he was the sole and absolute owner in his own right of all moneys invested and uninvested which were retained under the two contracts mentioned and deposited in the Treasury of the United States, and was exclusively entitled to all interest thereon. The said Moore also then stated to the said attorney that the said firm owed no debts except $550.00 which they owed to one Samuel F. Merrill for money borrowed from him to secure which the said firm had assigned to him the moneys retained under said contracts
19 Nos. 2361 and 2390 and also the moneys retained under contract No. 2542. Said Moore also then stated to said attorney that he was anxious to pay said Merrill, who, so he then claimed, was pressing for his money. The said Moore also then told the said attorney that the said assignments to the said Merrill were the only ones which the firm had ever made affecting the said retained monies and that they were otherwise absolutely free and clear of all claims except those of the Government. Said attorney then told said Moore that he should see if he could make an offer for the said moneys, and should advise him later upon the subject. Said attorney then and in the same month of November, 1898, communicated with your complainant and explained to him the terms and provisions usual in such contracts and the law upon the subject. The contingency of partial or total loss of the said retained moneys from breakage, defective work, and required repairs was carefully considered and calculated upon the average basis. Finally your complainant authorized said attorney to offer $2000.00 cash for the said moneys retained under said two contracts Nos. 2361 and 2390. This offer was full, adequate, fair and reasonable under the said contingency, as the said contracts then had some years to run until maturity, and was coupled with the proviso that your complainant should get a good title to the said retained moneys clear of all claims except those of the Government. Your complainant knew nothing of the said contractors composing the said firm of R. M. Moore & Co., nor of such contracts, nor of the matters or laws relating to public contracts. Your complainant had never before purchased any moneys retained under such contracts and laws, and was totally without ex-
20 perience or knowledge in the premises. A few days prior to November 29, 1898, your complainant, through his said attorney, offered the said Robert M. Moore as R. M. Moore & Co. $2000.00 cash with the proviso above mentioned for the moneys retained under the two said contracts Nos. 2361 and 2390. The said Moore took this offer under consideration for several days and finally on November 29, 1898, accepted it, of which acceptance I was advised by said attorney in December 1898. Your complainant's attorney then began his investigations of the conditions of the said moneys. He first made a thorough examination in the United States Treas-

ury, which showed the said moneys retained, the investments thereof, the dates and amounts thereof, and various other details. The Treasury records also showed the assignments to said Merrill above mentioned. No other assignments or claims of any other character whatsoever affecting these moneys appeared, nor did the Treasury officials in charge so far as said attorney could learn have any notice, knowledge or information of any such assignments or claims. The said records in the Treasury Department literally bore out the said Moore's previous statements to said attorney as to what he would find there. Having completed his search in the Treasury Department, with the result just stated, the said attorney, next, on or about December 13, 1898, made a like exhaustive examination of the records in the offices of the Commissioners of the District of Columbia. There he found absolutely nothing against the said moneys, nor did the District officials in charge of the matter so far as he could learn have any notice, knowledge or information of any assignments or claims against them. It appeared that the said Moore
21 had personally collected the final payment from the District on the said contract No. 2390. Next, the said attorney made a careful examination of the records in the office of the recorder of deeds of the District of Columbia beginning some months prior to the date of said contract No. 2361 and running down to date, but found nothing whatever affecting said contracts or retained moneys. Then said attorney closely examined the equity records in the clerk's office in the supreme court of the District of Columbia, but they did not show anything affecting the said contracts or retained moneys. Subsequently the said attorney continued all of the above examinations down to and including a part of December 21, 1898, on which date the sale and assignment of the retained moneys to your complainant were closed, but found no change. The said attorney then endeavored to find the said Wagenhurst. He got no trace of him in this city and District, and then sought for him in Philadelphia, Pa., but in vain. The said attorney could only learn that the said Wagenhurst had been here and there, but had gone to parts unknown. The said attorney was of opinion that by the records the said Moore as the senior member of the said firm of R. M. Moore & Co., composed of the said Robert M. Moore and Ellwood O. Wagenhurst, and as the alleged sole owner of the said retained moneys had full legal right and authority to sell and assign the said retained moneys to your complainant, whether the said Wagenhurst was dead or alive. The said attorney then prepared the necessary papers and had them executed upon the presumption that the said Wagenhurst was living, and that the said firm of R. M. Moore & Co. had not been dissolved.

Although the said attorney has always been a very active
22 practitioner of law in this District for nearly twenty years he never had the slightest knowledge or information of the existence or location of said Wagenhurst as a member of the bar of this court until the latter part of March, 1899, and even then his information upon this subject came entirely from a foreign city. After

the said attorney had proceeded as aforesaid he then prepared the necessary papers to close the sale and assignment of the said retained moneys to your complainant. The said attorney of your complainant, through the said Robert M. Moore as R. M. Moore & Co., paid in full in cash on December 21, 1898, the said Merrill's secured debt of $550.00 to the said Merrill who then executed and delivered reassignments to the said firm of R. M. Moore & Co. of the moneys retained under the said contracts Nos. 2361 and 2390 and theretofore assigned by the said R. M. Moore & Co. to him as aforesaid; and the balance of the said $2000.00 the said attorney paid in cash to the said Robert M. Moore as R. M. Moore & Co. on December 21, 1898. For these said payments the said attorney took special receipts from the said R. M. Moore & Co. and the said Merrill, both dated, signed and delivered on December 21, 1898. Every paper which the said attorney prepared and which was executed and delivered in this matter was in the name of the said R. M. Moore & Co. and in the then positive belief upon his part and that of your complainant that the said firm of R. M. Moore & Co. had never been dissolved, unless the said Wagenhurst had died. Every one of these papers sharply repels the idea of any notice, information, knowledge or belief upon the part of the said attorney or that of your complainant that the said firm of R. M. Moore & Co. had ever been dissolved by mutual consent of the members thereof, or other-
23 wise, but this fact was to the said attorney and your complainant directly to the contrary. There was absolutely nothing of record in any of the offices in which the said attorney made examinations as aforesaid to give the slightest intimation of any dissolution of the said firm in any manner whatsoever, either voluntary or involuntary. Neither the said attorney nor your complainant knew of any such dissolution and got no such information, and neither knew, heard of nor found any such dissolution or any record thereof. The said contracts themselves absolutely prevented any voluntary dissolution of the said firm as to them until after their maturity. The first information which the said attorney for your complainant received upon this subject, which would even justify a suspicion as to a prior voluntary dissolution of the said firm, was derived from a letter written to the said attorney by the defendant John K. Little under date of March 18, 1899. Neither the said attorney nor your complainant was every fully informed that the said firm had been voluntarily dissolved by the said Wagenhurst's retirement therefrom prior to December 21, 1898, until the said Wagenhurst so stated to the said attorney in the summer of the year 1900 and shortly before September 6, 1900. While believing the said statements of the said Moore to the said attorney as to the said purchase by the said Moore of the said Wagenhurst's interest in the said moneys retained under the said contracts Nos. 2361 and 2390, yet, out of an abundance of caution, and because the said Moore said that that transaction was in parol, the said attorney had the said Moore verify his said claim of his absolute ownership thereof by his oath, and a true copy of the said

affidavit of the said Moore, in this respect is hereto an-
24 nexed and made part hereof marked "Complainant's Exhibit E. W. No. 11." The said indemnity bond that was executed and delivered to your complainant was made in conformity with the provisions of the said assignment. Both the principals and the sureties who executed the said bond are wholly insolvent, and the said Robert M. Moore and Kate C. Moore named in the said bond are non-residents of the District of Columbia. Upon information and belief your complainant avers that very soon after December 21, 1898, the said Robert M. Moore left the District of Columbia, and went to Havana, Cuba, where he has ever since been, and still is. Your complainant's said attorney has never since seen the said Robert M. Moore, nor has your complainant or the said attorney ever heard from him. As to the alleged claim of the defendant John K. Little to the said retained moneys, the first your complainant or the said attorney ever heard of them was on or about March 9, 1899, from a letter dated February 7, 1899, written in Philadelphia, Pa., by the said Little, and enclosed in an envelope addressed to "Elias Wineland, attorney at law, Washington, D. C." which letter is now in the hands of your complainant and will be duly produced. Your complainant never was a resident of Washington, D. C. nor a lawyer, but was on the date of the said letter, and for many years prior thereto had been, and ever since has been, and is now, a resident of Philadelphia, Pennsylvania, and engaged in business there as a wholesale merchant. This letter first came into the hands of the said attorney, before your complainant saw it, by a mere accident. It was delivered at a place in this city where your complainant was unknown, but where said attorney was known, and it was
25 shown to the said attorney with an inquiry as to whether he knew of any such person as the addressee. Said attorney replied that he knew a Mr. Elias Wineland, and the said letter was then delivered to the said attorney for your complainant. Thereafter the said attorney had some correspondence with the defendant Little, which will be duly produced. As to the alleged claims of the defendant John E. Reyburn to the said retained moneys, the first your complainant or the said attorney ever knew or heard of them was in the summer of the year 1900, when the said attorney first saw the defendant Wagenhurst, who then gave him some intimation of an exceedingly general character as to some other possible claims of some person other than said Little, but said Wagenhurst did not then mention said Reyburn's name to said attorney. Said Wagenhurst also then gave said attorney some general information about the alleged claims of said Little, of which the said attorney and your complainant had previously, and in March 1899, learned something, as hereinbefore stated. The said Wagenhurst then gave said attorney no specific or useful information concerning the alleged claims of the said Reyburn and Little, but the first full and specific advice regarding the said Reyburn and Little and their alleged claims, which the said attorney received, came from the said Wagenhurst on or about September 22, 1900. The claim or pretense

of the said Robert M. Moore, as R. M. Moore & Co., of his right and authority to sell and assign the said retained moneys to your complainant, was founded both upon his assertion of his own absolute ownership thereof in his own right by his said prior purchase of said Wagenhurst's interest therein, and his power in law as the senior partner of the ex-
26 isting partnership of R. M. Moore & Co., or as the surviving partner of said firm in case of said Wagenhurst's death, which claim or pretense your complainant and the said attorney fully believed, and upon which they fully relied. Under the facts above stated your complainant believes and avers that the said Robert M. Moore was rightfully entitled to sell and convey or assign the said retained moneys, and he did so sell and convey or assign them to your complainant on December 21, 1898, as aforesaid. The consideration therefor was $2000.00 cash, and it was *bona fide* and truly paid by your complainant independently of the recital in the said deed or assignment, as was also the additional sum of not less than $250.00 in connection therewith. Your complainant and his said attorney had absolutely no notice whatever, previous and down to the time of paying the said money and the delivery of the said deed or assignment, of any rights or claims of any of the defendants, Wagenhurst, Little and Reyburn, and the circumstances of the transaction were entirely valid and have been fairly stated. The said $2000.00 were paid in full in cash at the time of the sale and assignment of the said retained moneys to your complainant on December 21, 1898, and the transaction was *bona fide* in all respects upon the part of your complainant and that of his said attorney. Whether the defendants Wagenhurst, Reyburn and Little, or any of them, knew, before or at the time thereof, of the said sale and assignment of the said retained moneys to your complainant, or derived any benefit therefrom, your complainant cannot now state; but the said defendants took no steps whatever to make their alleged claims known to the Treasurer of the United States until more than one year and a half after the said sale and assignment to your
27 complainant and three years after their alleged claims, arose, although they knew that the said moneys were invested in interest-bearing bonds, and that the interest thereon was being paid out quarterly to someone, but not to them. Even the said Little took no steps in this direction until August, 1900, although he learned of the said sale and assignment to your complainant as early as February, 1899, as he stated in his said letter hereinbefore mentioned. Your complainant avers that the alleged claims to the said retained moneys of the defendants Wagenhurst, Reyburn and Little, and especially those of the defendants Reyburn and Little, are invalid and of no effect, and that neither in law nor in fact have they any just claims or rights whatsoever in or to the said retained moneys or any part thereof. Whether their said claims, if they were in fact evidenced by writings, were in fact truly made and dated, or antedated, or whether they were in fact based upon valu-

able considerations, or were made in good faith, your complainant cannot now state; but he avers that at all events the same do not and cannot include the said retained moneys or any part thereof, nor the are same of any validity whatsoever, against your complainant and his rights and ownership in and of the whole of the said retained moneys. Upon information, derived from the defendant Robert M. Moore and his said affidavit, your complainant alleges that the defendant Wagenhurst prior to, December 21, 1898, sold and assigned his interest in the said moneys retained under said contracts Nos. 2361 and 2390 to the said Robert M. Moore, the senior partner of the said firm of R. M. Moore & Co., and that the said Moore was then sole owner thereof absolutely and in his
28 own right, but the said firm was not dissolved and by reason of the fact that your complainant had no notice, knowledge, information or belief whatsoever that the said firm had been dissolved prior to December 21, 1898, if it was in fact dissolved, your complainant avers that the said Robert M. Moore as R. M. Moore & Co. had full power and authority to sell and assign the said retained moneys to your complainant whether the said firm was dissolved or not. Your complainant had not the slightest notice, knowledge, information or belief as to any dissolution of the said firm until the time hereinbefore mentioned and from the source above stated; and as a matter of fact your complainant never did hear or learn of the alleged dissolution until long after the said sale and assignment to him of the said retained moneys, as hereinbefore stated. There was an entire want of any notice of the alleged dissolution of the said firm of R. M. Moore & Co. on the part of your complainant and that of his said attorney prior to and down to the time of the said sale and assignment of the said retained moneys to your complainant on December 21, 1898, and for some time thereafter.

38. Your complainant further avers that the moneys retained under the said contract No. 2361 will be due and payable on June 2, 1902. The principals and sureties named in the said indemnity bond to your complainant are totally insolvent, as aforesaid. The defendants Reyburn, Little and Moore are non-residents of the District of Columbia, and all of the defendants to this bill are either insolvent or of very doubtful financial standing. Unless enjoined or otherwise prevented by this court from so doing, the defend-
29 ants intend to and will collect and receive the said moneys, and remove the same from the jurisdiction of this court, and wholly ignore your complainant in the disposition thereof. Your complainant further avers, in view of the premises, that a receiver of the said moneys should be appointed by this court to collect, receive and hold the same, subject to the orders of this court, and until the respective rights and interests therein of the parties to this suit may be fully adjudicated and finally determined.

39. Your complainant further charges that the defendant Wagenhurst in his said letter of July 18, 1900, hereinbefore referred to in paragraph 13 of this bill of complaint, asserted the then existence of the said firm of R. M. Moore & Co. and that he, the said Wagen-

hurst, was then a "partner in said firm," and he, the said Wagenhurst, then and thereby assumed to give vital directions as such partner respecting the said retained moneys in the firm name of R. M. Moore & Co. This letter he then signed, as hereinbefore stated, as "formerly of R. M. Moore & Co." Your complainant does not now really know whether the said firm of R. M. Moore & Co. was or was not in fact dissolved prior to December 21, 1898, but by reason of the entire want of any notice, knowledge, information or belief upon his part or that of his said attorney of any dissolution of the said firm prior to December 21, 1898, the fact of said dissolution, if the same in fact occurred, is wholly invalid, immaterial, inconsequential, and of no force and effect as against your complainant and his aforesaid ownership and rights of and in the said retained moneys.

40. Your complainant further charges that, even if the said firm of R. M. Moore & Co. was in fact voluntarily dissolved by mu-
30 tual consent of the said members thereof, and due notice of such dissolution given, prior to December 21, 1898, yet the defendant Wagenhurst continued thereafter and until at least July 18, 1900, to hold out the continuance of said firm and himself as a member thereof, and was therefore as equally bound by the said sale and assignment to your complainant as if such alleged dissolution had not occurred and such notice had not been given. The said contract No. 2390 was not completed until May 18, 1898, which was at least eight months after the alleged dissolution, and the said records conclusively show that it was completed by the original firm of R. M. Moore & Co. and by no other person or persons whomsoever. The defendants Wagenhurst, Reyburn and Little knowingly and actively participated in holding out the continuance of the original firm, as said records show, and they purposely and intentionally withheld any notice of such alleged dissolution to the other party to said contracts Nos. 2361 and 2390, as well as any such notice to the said treasurer and commissioner; and this they did for their own advantage, and for reasons clearly manifest from what has been stated hereinbefore; and the said sale and assignment of the said retained moneys to your complainant could never have occurred except for the aforesaid negligent and intentional acts of omission and commission of the said defendants Wagenhurst, Reyburn and Little.

Prayers.

The premises considered, your complainant respectfully prays as follows:

1. That process may issue requiring the defendants and each of them to appear and answer the exigencies of this bill of
31 complaint, but not under oath, oath to the answer to each of them being hereby expressly waived.

2. That the defendants and each of them may be required to make full and complete discovery in the premises, and especially as to their alleged claims, notice of record thereof, and all material details relating thereto.

3. That the absolute ownership of your complainant of the whole of the said retained moneys, bonds and interest may be decreed, declared and confirmed by this court.

4. That the defendants Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore and each of them may be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with the said retained moneys, bonds or interest, or any part thereof, and especially that they and each of them may be likewise enjoined from collecting or receiving either directly or indirectly of any person either personally or by agent or attorney the said retained moneys, bonds, or interest or any part thereof, and that they and each of them may be likewise enjoined from executing or delivering any receipt, voucher or acquittance for the purpose of withdrawing the said moneys, bonds and interest or any part thereof from the United States Treasury.

5. That the defendant Ellis H. Roberts, Treasurer of the United States and commissioner as aforesaid may be requested to furnish this court with certified copies of the said letters received by him from the defendants John E. Reyburn and John K. Little hereinbefore referred to in paragraph 24 of this bill of complaint, to-
32 gether with certified copies of the answers of the said Treasurer and commissioner to the said letters.

6. That a receiver or receivers may be appointed by this court to collect, receive and hold the said retained moneys, bonds and interest, subject to the order of this court and its final decree in the premises, and that the defendants to this bill of complaint and each of them, except the defendant, Ellis H. Roberts, may be directed and required to execute and deliver all such receipts, vouchers, acquittances and other instruments as may be necessary to enable, authorize and empower the said receiver or receivers to collect or receive and withdraw the said retained moneys, bonds and interest from the said treasurer and commissioner and the Treasury Department of the United States.

7. That your complainant may have such other and further relief in the premises as the court may deem just and proper.

And, as in duty bound, your complainant will ever pray, etc.

The defendants to this bill of complaint are Ellwood O. Wagenhurst, Ellis H. Roberts, Treasurer of the United States of America, and *ex officio* commissioner of the sinking fund of the District of Columbia, John E. Reyburn, John K. Little and Robert M. Moore.

ELIAS WINELAND.

THOMAS M. FIELDS,
Solicitor for Complainant.

33 CITY OF PHILADELPHIA, }
State of Pennsylvania, } *ss:*

Personally appeared before me the above-named Elias Wineland, who being by me first duly sworn, deposes and says that he is the complainant named in the foregoing bill of complaint by him sub-

scribed; that he has read the same and knows the contents thereof; that the matters and things therein set forth upon personal knowledge are true; and that those therein stated upon information and belief he believes to be true.

ELIAS WINELAND.

Subscribed and sworn to before me this twenty-seventh day of May, A. D. 1902.

ISRAEL HECHT,
Notary Public.

[SEAL.]

Commission expires February 27th, 1905.

34 COMPLAINANT'S EXHIBIT E. W. No. 1.

Filed September 6, 1900.

Filed Jun- 7, 1902.

D. W. B.
In replying please quote initials.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER,
WASHINGTON, D. C., *November* 30, 1898.

Thomas M. Fields, 317 4½ street N. W., Washington, D. C.

SIR: Herewith you will find the information requested in your letter of the 29th instant, authorized by letter of R. M. Moore and Co. you enclosed, relative to the retentions from their contracts numbered 2361 and 2390 with the District of Columbia.

Contract Number 2361.

June 17, 1897, amount retained		$1,517.37
Deposited in the Treasury at the request of the District Commissioners and order of the Secretary of the Treasury:		
November 9, 1897	$7.50	
May 18, 1898	15.00	
		22.50
Balance of retention		1,494.87

Investments.

January 7, 1898, $1,300 U. S. 4 % bonds of 1907 at 113	1,469.00
Cash balance uninvested	25.87

Contract No. 2390.

September 10, 1897, amount retained.....	$376.99	
June 8, 1898, amount retained.....	1,232.32	
		1,609.31

Investments.

January 7, 1898, $300 U. S. 4 % bonds of 1907 at 113.....	339.00	
July 7, 1898, $1,150 U. S. 4 % bonds of 1907 at 110.375.....	1,269.31	
		1,608.31
Cash balance uninvested.....		1.00

Respectfully yours, ELLIS H. ROBERTS,
Treasurer U. S., ex Officio Com'r Sinking Fund, D. C.

COMPLAINANT'S EXHIBIT E. W. No. 2.

Filed September 6, 1900.

Filed Jun- 7, 1902.

Know all men by these presents, that we, R. M. Moore & Co., contractors with the District of Columbia under two certain contracts Nos. 2361 and 2390, dated respectively October 20, 1896, and May 19, 1897, for laying sewers, completed respectively June 2, 1897, and May 11, 1898, being entitled to certain moneys retained under the said contracts, which retained moneys are now in the hands of the Treasurer of the United States as *ex officio* commissioner of the sinking fund of the District of Columbia, said retentions being as follows: Contract No. 2361; June 17, 1897, amount retained, $1,517.37. Deposited in the Treasury at the request of the District Commissioners and order of the Secretary of the Treasury. Deductions; November 9, 1897, $7.50; May 18, 1898, $15.00; total deductions $22.50. Net balance of retention, $1,494.87. Investments, January 7, 1898, $1,300.00 U. S. 4 % bonds of 1907 at 113, $1,469.00 cash balance uninvested, $25.87. Contract No. 2390; September 10, 1897, amount retained, $376.99; June 8, 1898, amount retained, $1,232.32; total amount retained, $1,609.31. Deductions, none. Investments January 7, 1898, $300.00 U. S. 4 % bonds of 1907 at 113, $339.00; July 7, 1898, $1,150.00 U. S. 4 % bonds of 1907 at 110.375, $1,269.31; total investments, $1,608.31. Cash balance uninvested, $1.00; said bonds being now in the hands of said Treasurer as trustee under said contracts and for our use and benefit, and all present and future interest thereon being payable to us;

35 *Now, therefore*, for and in consideration of the sum of ten dollars ($10.00), current money of the United States, to us in

hand paid, at and before the sealing and delivery of these presents, by Elias Wineland, of Philadelphia, Pennsylvania, the receipt whereof we do hereby acknowledge, we, the said R. M. Moore and Co. do hereby grant, bargain, sell, transfer, assign and set over, absolutely and without any limitation, condition or reservation whatever, unto and to him, the said Elias Wineland, his executors, administrators and assigns, the whole of the said retained monies, and all of our right, title, claim, demand, interest and estate at law and in equity and otherwise howsoever in and to the said retained monies, bonds, interest, present and future, and cash balances;

To have and to hold, the said retained monies, bonds, interest, present and future, and cash balances unto and to him, the said Elias Wineland, his executors, administrators and assigns, forever, free, clear and discharged of and from all claims and demands of all persons, firms and corporations against whom and which we do hereby warrant and defend the premises:

And further, we do hereby covenant and agree to and with him, the said Elias Wineland, his executors, administrators and assigns, that we shall and will execute and deliver, at any time and at our sole expense, to him, the said Elias Wineland, his executors, administrators and assigns, or any other person, firm or corporation, which he or they may appoint in writing, any other and further assurances, receipts, vouchers, warrants, letters or powers of attorney, or other instruments of writing, which he, the said Elias Wineland, his executors, administrators and assigns, or his or their counsel learned in the law, may advise or require, to enable him, the said Elias Wineland, his executors and administrators and assigns, to collect, receive for, and acquire full possession, use and benefit of the said retained monies, bonds, interest, present and future, and cash balances:

And further, we do hereby covenant and agree to and with him, the said Elias Wineland, his executors, administrators and assigns, that any and all repairs to the sewers laid by us under the said contracts which may be duly required shall and will be made by us at our sole cost and expense and without loss, diminution or deduction from the said retentions, and to this end to execute and deliver to him, the said Elias Wineland, with these presents, a satisfactory indemnity bond with sureties:

And further, we do hereby covenant and agree to and with him, the said Elias Wineland, that all of the covenants herein contained shall bind ourselves, our executors, administrators and assigns, jointly and severally, and shall be for the benefit and advantage of him, the said Elias Wineland, and his executors, administrators and assigns:

And, for the better and more effectual execution of the foregoing assignment of said retentions, bonds, interest, present and future, and cash balances, we do hereby make, constitute and appoint the said Elias Wineland, our true and lawful attorney, irrevocable and coupled with an interest, with full power and authority for us and in our names, place and stead, to demand,

ask and sue for, collect, receive, receipt and endorse our name for the said retentions, bonds, interest, present and future, and cash balances, to and from the proper officer or person, with full power and authority to do and to perform all acts and execute all deeds whatever which may be requisite, desirable or proper in and about the premises, as fully to all intents and purposes as we might or could do if personally present; with full power of substitution and revocation to our said attorney, Elias Wineland; hereby ratifying and confirming all that our said attorney, Elias Wineland, may do or cause to be done in the premises; and hereby revoking and annulling any and all former powers of attorney or authorization whatever in the premises, except only two certain special powers of attorney of even date herewith to him, the said Elias Wineland, for the collection of interest on the said bonds.

In testimony whereof we hereunto set our hand and seal this twenty-first day of December, A. D. 1898.

R. M. MOORE & CO. [SEAL.]

(Stamp.)

Signed, sealed, and delivered in the presence of—
THOMAS M. FIELDS.
S. F. MERRILL.

Filed, Jun- 7 1902.

DISTRICT OF COLUMBIA, *ss:*

I, Charles S. Bundy, a notary public in and for the District of Columbia, do hereby certify that R. M. Moore & Co., parties to a certain deed bearing date December 21, A. D. 1898, and hereunto annexed, to me personally well known, appeared personally before me in the said District of Columbia and acknowledged the said deed to be their act and deed.

Given under my hand and official seal this twenty-first day of December, A. D. 1898.

[SEAL.] CHARLES S. BUNDY,
Notary Public, D. C.

COMPLAINANT'S EXHIBIT E. W. No. 3.

Filed September 6, 1900.

Filed Jun- 7, 1902.

Know all men by these presents, that we, R. M. Moore & Co., do hereby appoint Elias Wineland, No. 213 North Third street, Philadelphia, Pennsylvania, our attorney to receive from the proper officer, and full discharge for the same to give, all interest now due or which may hereafter accrue on all bonds now standing or which

may hereafter stand in the name of the Treasurer of the United States as trustee under contract No. 2361 between the Dis-
37 trict of Columbia and us, the said R. M. Moore & Co., on the books of the Treasury Department; hereby granting to said attorney power to appoint one or more substitutes for the purposes herein expressed; hereby ratifying and confirming all that may be done by virtue hereof; and hereby revoking all former powers of attorney in the premises.

Witness our hands and seals this twenty-first day of December, A. D. 1898.

R. M. MOORE & CO. [SEAL.]

(Stamp.)

Signed, sealed, and delivered in the presence of—

THOMAS M. FIELDS.
S. T. MERRILL.

Be it known that on the twenty-first day of December, A. D. 1898, before me, Charles S. Bundy, personally appeared R. M. Moore & Co., named in the foregoing letter of attorney, and acknowledged the said letter of attorney to be their act and deed.

In testimony whereof I have hereunto set my hand and affixed my seal the day and year aforesaid in the city of Wasington, District of Columbia.

CHARLES S. BUNDY,
[SEAL.] *Notary Public, D. C.*

COMPLAINANT'S EXHIBIT E. W. No. 4.

Filed September 6, 1900.

Filed Jun- 7, 1902.

Know all men by these presents, that we, R. M. Moore & Co., do hereby appoint Elias Wineland, of No. 213 North Third street, Philadelphia, Pennsylvania, our attorney to, receive from the proper officer, and full discharge for the same to give, all interest now due or which may hereafter accrue on all bonds now standing or which may hereafter stand in the name of the Treasurer of the United States as trustee under contract No. 2390 between the District of Columbia and us, the said R. M. Moore & Co., on the books of the Treasury Department; hereby granting to said attorney power to appoint one or more substitutes for the purposes herein expressed; hereby ratifying and confirming all that may be done by virtue hereof; and hereby revoking all former powers of attorney in the premises.

Witness our hands and seals this twenty-first day of December, A. D. 1898.

R. M. MOORE & CO. [SEAL.]

(Stamp.)

Signed, sealed, and delivered in the presence of—
THOMAS M. FIELDS.
S. T. MERRILL.

38 *Be it known* that on the twenty-first day of December, A. D. 1898, before me, Charles S. Bundy, personally appeared R. M. Moore & Co., named in the foregoing letter of attorney, and acknowledged the said letter of attorney to be their act and deed.

In testimony whereof I have hereunto set my hand and affixed my seal the day and year aforesaid in the city of Washington, District of Columbia.

CHARLES S. BUNDY,
Notary Public, D. C.

[SEAL.]

COMPLAINANT'S EXHIBIT E. W. No. 5.

Filed Jun- 7, 1902.

DECEMBER 21, 1898.

Hon. Ellis H. Roberts, Treasurer of the U. S., Washington, D. C.

SIR: I have the honor to enclose herein two powers of attorney from R. M. Moore & Co. to Elias Wineland to collect interest on bonds under contracts Nos. 2361 and 2390 between the District of Columbia and R. M. Moore & Co. Please send the interest checks hereafter to Mr. Wineland directly to his address given in both of the enclosed instruments.

I have also the honor to advise you that the monies retained under said contracts, and the bonds in which these monies have been invested, with all interest, have been this day duly assigned absolutely by R. M. Moore & Co. to said Elias Wineland.

Very respectfully, THOMAS M. FIELDS.

(2 enclosures.)

COMPLAINANT'S EXHIBIT E. W. No. 6.

Filed Jun- 7, 1902.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER,
WASHINGTON, D. C., *December* 24, 1898.

Thomas M. Fields, 225 4½ St. N. W., Washington, D. C.

SIR: This office is in receipt of your letter of the 23d instant enclosing two powers of attorney, dated December 21, 1898, from R. M.

Moore and Company to Elias Wineland, of Philadelphia, Pa., authorizing him to collect interest on the bonds in which the retentions from contracts numbered 2361 and 2390, District of Columbia, with R. M. Moore and Co., are invested.

These authorities are filed in the office of the auditor for the Treasury Department.

Respectfully yours, ELLIS H. ROBERTS,
Treasurer U. S., ex Officio Com'r Sinking Fund, D. C.

39 COMPLAINANT'S EXHIBIT E. W. No. 6½.

Filed Jun- 7, 1902.

" WASHINGTON, D. C., *July* 18, 1900.

Treasurer of the United States Treasury Department, U. S., Washington, D. C.

SIR: Relative to contracts No. 2361 and No. 2390, between the District of Columbia and R. M. Moore and Co., entered into respectively on Oct. 20th, 1896, and May 19th, 1897, certain funds of which are now retained in the hands of the U. S. Treasurer and invested to the credit of said firm in U. S. securities according to terms of contracts, I hereby direct as partner in said firm that no further moneys out of said retained sums or securities be paid out as interest or principal on account of R. M. Moore & Co. until further notice from me.

May I ask you to kindly acknowledge receipt of this, and to inform me of your action in the premises.

Respectfully, ELLWOOD O. WAGENHURST,
(*Formerly of R. M. Moore & Co.*) 408 *Fifth St. N. W.*"

40 COMPLAINANT'S EXHIBIT E. W. No. 7.

Filed Jun- 7, 1902.

H. W. B.
In replying please quote about initials.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER,
WASHINGTON, D. C., *July* 19, 1900.

Elias Wineland, 213 North 3d St., Philadelphia, Pa.

SIR: This office is in receipt this day of a letter from Ellwood O. Wagenhurst, directing, as a partner in the firm of R. M. Moore & Co., that no further moneys as interest or principal of the retained fund on acconnt of their contracts numbered 2361 and 2390 with the District of Columbia be paid for account of R. M. Moore & Co., until further notice from him.

In view of this request the checks for interest on the bonds in

which the retention from contracts numbered 2361 and 2390 are invested will, for the present, be retained in this office.

Respectfully yours, ELLIS H. ROBERTS,
Treasurer U. S., ex Officio Com't Sinking Fund, D. C.

COMPLAINANT'S EXHIBIT E. W. No. 8.

Filed Jun- 7, 1902.

Know all men by these presents, that we R. M. Moore & Co., Robert M. Moore, Kate C. Moore, and Adam McCandlish, do hereby acknowledge ourselves indebted, and are held and firmly bound to Elias Wineland in the penal sum of two thousand dollars ($2,000.00), for the payment of which we hereby bind ourselves and every of our heirs, executors and administrators, jointly and severally, by these presents, for and in the whole.

Sealed with our seals and dated this twenty-first day of December, A. D. 1898.

Whereas said R. M. Moore & Co., and Robert M. Moore have sold and assigned to said Elias Wineland certain monies amounting to $1,517.37, retained under contract No. 2361, between the said R. M. Moore & Co. and the District of Columbia, and now in the Treasury of the United States, and also certain other monies amounting to $1,609.31, retained under contract No. 2390 between said R. M. Moore & Co. and the District of Columbia, and now in the Treasury of the United States.

Now the condition of the above obligation is such that if the said retained monies and all accruing interest on the investments thereof shall be paid in full by the Treasurer of the United States to the said Elias Wineland, his executors, administrators, and assigns, when due and payable by the terms of said contracts and by law then the above obligation to be void and of no effect; otherwise to be and remain in full force and effect.

R. M. MOORE & CO. [SEAL.]
ROBERT M. MOORE. [SEAL.]
KATE C. MOORE. [SEAL.]
ADAM McCANDLISH. [SEAL.]

(Stamp.)

Attest:

THOMAS M. FIELDS.
DANIEL KEEMLE.

41 "COMPLAINANT'S EXHIBIT E. W. No. 9."

Filed Jun- 7, 1902.

OCTOBER 18, 1900.

Hon. Ellis H. Roberts, Treasurer U. S. and *ex officio* commissioner sinking fund, D. C., Washington D. C.

SIR: In the matter of moneys retained under contracts Nos. 2361 and 2390 between the District of Columbia and R. M. Moore & Co., I respectfully request that you will advise me whether any claim to these monies have been made to or filed with you, or in the Treasury Department, by or in behalf of Mr. John K. Little and Mr. John E. Reyburn, or either of them, both of Philadelphia, Pa., and, if so, what the substances of such claims are.

It has been suggested by the court, and the suggestion will be acted upon by Mr. Wineland, that in the pending suit the bill of complaint will be so amended as to make Messrs. Little and Reyburn parties defendant if they have presented claims to you. It is for this reason that the above information is desired.

Very respectfully, THOMAS M. FIELDS,
Attorney for Elias Wineland.

Filed Jun- 7, 1902.

H. W. B.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER,
WASHINGTON D. C., *October* 19, 1900.

Thomas M. Fields, att'y for Elias Wineland, 317 Four-and-a-half St. N. W., Washington, D. C.

SIR: This office is in receipt of your letter of the 18th instant requesting to be informed if any claim for moneys retained from District of Columbia contracts with R. M. Moore & Co., numbered 2361 and 2390, had been made by or in behalf of James K. Little or John E. Reyburn.

A letter, signed "John E. Reyburn," is on file stating that he holds an assignment from R. M. Moore & Co. of the retention from contract No. 2361. There is also a letter on file, signed "*John K Little*," claiming the retention from contract No. 2390.

Respectfully yours, ELLIS H. ROBERTS,
Treasurer U. S., ex Officio Com'r Sinking Fund, D. C.

Complainant's Exhibit E. W. No. 10.

42 COMPLAINANT'S EXHIBIT E. W. No. 11.

Filed June 7, 1902.

DISTRICT OF COLUMBIA, *ss*:

Robert M. Moore, being first duly sworn, deposes and says as follows:

I am the same Robert M. Moore named in contracts Nos. 2361 and 2390, dated respectively October 20, 1896, and May 19, 1897, between R. M. Moore & Co. and the District of Columbia, on the books of said District. I am now the sole and absolute owner in my own right of all monies, invested and uninvested, retained under said contracts and deposited in the Treasury of the United States, and am exclusively entitled to any and all interest now due or which may hereafter become due on all bonds in which said monies are invested. I make the representations herein set forth for the express purpose of inducing Elias Wineland, of Philadelphia, Pennsylvania, to pay me the sum of ($2000.00) two thousand dollars cash for said monies and bonds and interest.

And further deponent saith not.

ROBERT M. MOORE.

Attest:

THOMAS M. FIELDS.
S. F. MERRILL.

Subscribed and sworn to before me this twenty-first day of December, A. D. 1898.

[SEAL.] CHARLES S. BUNDY,
Notary Public, D. C.

43 *Affidavit of Thomas M. Fields in Support of Bill.*

Filed Jun- 7, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Thomas M. Fields, being first duly sworn, deposes and says as follows:

I am the complainant's solicitor in this suit. I drafted the original bill of complaint which has been filed herein. I have personal knowledge of the matters and things in the said bill set forth, as said bill shows, and know the same to be true. I further state that the defendants Wagenhurst and Reyburn are now, and for several days

past have been, very actively engaged in the offices of the Commissioners of the District of Columbia and the Treasury Department of the United States in efforts to receive, collect and receipt for the moneys retained under said contract No. 2361, which moneys became due and payable on and after June 2, 1902. The said Wagenhurst is and has been representing himself in such efforts as an active partner of the said firm of R. M. Moore & Co., claiming and asserting full power and authority as such partner to collect, receive and receipt for said moneys for the sole benefit of said Reyburn and himself. The purpose of said defendants is to withdraw said moneys from the Treasury with intent to convert the same to their own use,
in defiance of all rights of the complainant therein and before
44 he can protect the same through this court, and in order to
render futile any order or decree in the premises which this court may make; and this purpose they may or will accomplish unless restrained by this court.

I learned on the evening of June 6, 1902, that the defendant Robert M. Moore has just returned to this District from Havana, Cuba, and is now here; but for what purpose, or whether at the instigation or for the uses of the defendants Wagenhurst and Reyburn in the premises, the said Moore has returned, I do not now know, nor am I as yet advised.

And further affiant saith not.

THOMAS M. FIELDS.

Subscribed and sworn to before me this seventh day of June, 1902.

JOHN R. YOUNG, *Clerk.*

45 *Affidavit of Robert M. Moore.*

Filed Jun- 7, 1902.

DISTRICT OF COLUMBIA, *ss:*

Robert M. Moore, being first duly sworn, deposes and says as follows:

I am the same Robert M. Moore named in contracts Nos. 2361 and 2390, dated respectively October 20, 1896, and May 19, 1897, between R. M. Moore & Co. and the District of Columbia, on the books of said District. I am now the sole and absolute owner in my own right of all monies, invested and uninvested, retained under said contracts and deposited in the Treasury of the United States, and am exclusively entitled to any and all interest now due or which may hereafter become due on all bonds in which said monies are invested. I make the representations herein set forth for the express purpose of inducing Elias Wineland, of Philadelphia, Penn-

sylvania, to pay me the sum of ($2000.00) two thousand dollars cash for said monies and bonds and interest.

And further deponent saith not.

ROBERT M. MOORE.

Attest:

THOMAS M. FIELDS.
S. F. MERRILL.

Subscribed and sworn to before me this twenty-first day of December, A. D. 1898.

CHARLES S. BUNDY,
Notary Public, D. C.

[SEAL.]

46 *Rule to Show Cause, &c.*

Filed Jun- 9, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Upon consideration of the bill of complaint, and the affidavit and exhibits in support thereof, filed in this cause, and upon motion of Mr. Thomas M. Fields, solicitor for the complainant, it is, this ninth day of June, 1902, ordered that the defendants Ellwood O. Wagenhurst, Robert M. Moore and John E. Reyburn be and they are hereby required to show cause why they shall not be enjoined from collecting, receiving or receipting for the moneys retained under contract No. 2361 between R. M. Moore & Co. and the District of Columbia and now in the hands of the defendant Ellis H. Roberts, on or before June 18, 1902, at ten (10) o'clock a. m.

It is further ordered that the defendants to this suit show cause, if any they have, on or before said June 18, 1902, why this court shall not appoint a receiver of the said retained moneys, and also of the moneys retained under contract 2390 between the said R. M. Moore & Co. and the District of Columbia, and now in the hands of the defendant Ellis H. Roberts; provided that a copy of this order be served on the defendants at least two clear days before said June 18, 1902.

A. B. HAGNER,
Asso. Justice.

Marshal's Return.

47 Served copy of within order on defendant Ellis H. Roberts, Treasurer of United States, June 9, 1902, and on defendant Ellwood O. Wagenhurst June 10, 1902.

Defendant- Reyburn and Moore not to be found June 18, 1902.

AULICK PALMER, *Marshal.*
B.

Return to Rule.

Filed Jun- 30, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, JOHN E. Reyburn, JOHN K. Little, and Robert M. Moore, Defendants. } Equity. No. 23352.

The defendants Ellwood O. Wagenhurst and John E. Reyburn, for return to the rule to show cause, issued in the above entitled cause, state as follows:

That heretofore, and before the complainant exhibited his present bill in this court, to wit, on the 6th day of September, 1900, the said complainant filed his bill of complaint being original bill for injunction, in this court, in equity cause numbered 21,698, against this defendant Ellwood O. Wagenhurst and said Ellis H. Roberts,

48 Treasurer of the United States and *ex officio* commissioner of the sinking fund of the District of Columbia; and thereafter, the said complainant, on November 15, 1900, filed in said court his amended bill of complaint wherein he added as parties defendant in said cause the now defendants herein, namely, John E. Reyburn and John K. Little. All of said defendants were sued in their own rights, respectively, excepting the said Roberts, who was sued as Treasurer and *ex officio* commissioner aforesaid, and the complainant sued in his own right. And in such pleadings in said cause the said complainant prayed that the sole and absolute ownership of the whole of certain moneys, bonds and interest in the hands of the U. S. Treasurer and *ex officio* commissioner aforesaid, to wit, the sum of $1517.37 (subject to a deduction of $22.50) and $1609.31 under two certain sewer contracts numbered 2361 and 2390, respectively, between Robert M. Moore (now defendant) and said Ellwood O. Wagenhurst as co-partners trading under the firm name of R. M. Moore & Co. and District of Columbia, might be declared and confirmed in him, the said complainant, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with said moneys, bonds and interest, or any part thereof.

And the said complainant Wineland, in said pleadings in said equity cause No. 21,698, sued for the said cause of action, and claimed title to all of said moneys, bonds and interest, by virtue of a certain instrument of writing bearing date December 21, 1898, alleged to be an assignment by R. M. Moore in the name of the said firm, which said instrument and said contracts Nos. 2361 and 2390 are the identical agreements which are set out and referred to by the

said complainant in his present bill of complaint. To which
49 original and amended bills, in equity No. 21,698, the said defendants (who are now defendants) viz: Wagenhurst, Reyburn and Little, duly filed answers, and afterwards, to wit, such other proceedings were had in said cause as that the same was twice set down for hearing on bill and answer, first by the complainant on his original bill, and a second by complainant on his amended bill, and being heard and considered on the merits by this honorable court a decree was entered therein in favor of the said complainant, whereupon an appeal was taken to the Court of Appeals of the District of Columbia, on November 15, 1901, by the defendants in said cause. And said appeal being duly heard, a decree was rendered by the said Court of Appeals on May 7, 1902, directing that the said bill of complaint be remanded to this honorable court for dismissal, with costs upon the complainant; and later, on June 9, 1902, a final decree was entered in this honorable court dismissing the bill in said equity cause No. 21,698, with costs, as ordered. And for their costs in that behalf the defendants Wagenhurst, Reyburn and Little were awarded execution as at law against the said complainant Elias Wineland (who is now complainant). All of which will more fully and at large appear by reference to the proceedings, record and decree in said equity cause No. 21,698, which it is prayed may be read and considered at the hearing hereof as a part of this response.

The defendants further show that the said Elias Wineland in the said equity cause No. 21,698 sued the same parties defendant now sued herein, save Robert M. Moore who is also made a party defendant in this suit, in respect of the identical subject matter embraced in the present bill of complaint, and in said former suit it was sought, among other things, to obtain a decree declaring and
50 confirming to the said Elias Wineland, the sole and absolute ownership "in his own right" of the whole and all of the said retained moneys, bonds and interest under contracts Nos. 2361 and 2390 as aforesaid, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with said moneys, bonds and interest, or any part thereof, in the hands of the said Treasurer and *ex officio* commissioner, as aforesaid. That the said cause was decided adversely to the said complainant by the Court of Appeals, though said complainant, on May 22, 1902, filed a motion for a modification of said decree, supported by an elaborate brief, and affidavits in which, it was prayed among other things, that the said decree be so modified by the Court of Appeals as "to make the dismissal of the bill without prejudice to the right of the complainant to institute another suit," for the purpose of supplying new allegations and proof thereof, and the said motion to so modify was on June 6, 1902 refused and denied by the said court.

That notwithstanding the said decree of the Court of Appeals, the refusal of said court to modify the same, and the final decree entered in said cause No. 21,698 in this honorable court as ordered,

dismissing the bill of complaint therein, the said Elias Wineland has instituted the present equity cause No. 23352, which involves the identical subject-matter above referred to, and is between the same parties, suing in the same capacities, in respect of the same alleged title to the same property sued for in said former suit; and the defendants herein are advised, and therefore aver, that they should not be further subjected to the expense, annoyance and vexation of again defending the title of the said John E. Reyburn and John K. Little to the said moneys, bonds and interest.

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The respondents file herewith as a part hereof a copy of the record in the Court of Appeals in said above mentioned cause No. 21,698; also a copy of the motion made and filed by the complainant for a modification — the decree made by the Court of Appeals; and a copy of the briefs used in the said court by the parties adversary to said complainant Wineland, including a printed copy of their statement in opposition to the motion by the said Wineland for a modification.

The defendants Ellwood O. Wagenhurst and John E. Reyburn deny that they, or either of them, now are, or were insolvent at the time of the institution of this suit, or that they or either of them have made any effort whatever to receive, collect or receipt for the moneys retained under the said contract No. 2361, or that they or either of them have been engaged in any such effort, as alleged in the affidavit of Thomas M. Fields filed herein. And the defendant Reyburn files in support hereof his affidavit.

All the matters and things set forth in the said former proceedings, record and decree, these defendants do aver and plead in bar of complainant's present bill of complaint, and pray the judgment of this honorable court whether they shall be compelled to make further answer to said rule, or to the complainant's said bill, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

These defendants further show that Elias Wineland, the complainant herein, is the plaintiff in an action at law now pending in this honorable court, to wit, action at law No. 45,489 in the supreme court of the District of Columbia (doc. 49), the said action being a suit brought by the said Wineland on the indemnifying bond mentioned and described in these proceedings as executed to the said Wineland at the time of his transaction with Robert M. Moore in December 1898, when he claims to have derived ownership from the said Moore of the retained moneys now in the Treasury Department under the District contracts Nos. 2361 and 2390 above mentioned, the said bond having been conditioned to save the said Wineland from loss resulting from non-payment to him of the said moneys retained in the Treasury Department as aforesaid; and these defendants aver that the said Wineland is not at liberty to prosecute both his said actions simultaneously, to wit, this proceeding in equity No. 23352 to recover the said moneys specifically, and the action at law above mentioned No. 45489 to recover damages for the non-payment of the said moneys.

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And having fully answered said rule to show cause, these defendants ask that the same be discharged, and they pray also for such other relief as may be proper in the premises.

ELLWOOD O. WAGENHURST,
JOHN E. REYBURN,
By E. O. WAGENHURST,
His Solicitor.

DISTRICT OF COLUMBIA, *ss:*

I, Ellwood O. Wagenhurst, one of the defendants above named, being duly sworn depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information
53 and belief, I believe to be true.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 30th day of June, A. D. 1902.

J. R. YOUNG, *Clerk,*
By FRED. C. O'CONNELL, *Ass't Clerk.*

Affidavit of John E. Reyburn.

Filed Jun- 30, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

John E. Reyburn, being duly sworn, deposes and says that he is one of the defendants in the above entitled cause, and he denies that for several days prior to June 9, 1902, or at any time during said month, he has been very actively or otherwise engaged, in the offices of the Commissioners of the District of Columbia and of the Treasury Department of the United States, or in either of said places, in any efforts whatever to receive, collect and receipt for the moneys retained under the said contract No. 2361, as set forth in the affidavit of Thomas M. Fields; or that he has made any effort or attempt whatever in person or by any agent whomsoever to collect or receive the said moneys, or any part thereof; or that he has visited either of said places during the time mentioned; or that the said
54 Ellwood O. Wagenhurst has been representing affiant in such alleged efforts, or as an active partner of the firm of R. M. Moore & Co. so far as this affiant has any knowledge or information, and this affiant avers that all statements to the contrary are untrue

and without any foundation in fact; and affiant on information and belief, avers that the said Wagenhurst has not made any such efforts or representations as alleged.

This affiant further avers that for the past eight years he has had, and now has, a residence in the city of Washington, D. C., being house No. 1301 Connecticut avenue, northwest, (opposite the British legation) which he leases and where he expects to reside for the three years next ensuing, the term of lease being for that period, and this affiant is the owner of property beyond his debts and liabilities and subject to execution, in said residence and in said city, exceeding in value $5000. This affiant denies that he is insolvent, or ever was insolvent, or that there ever was the slightest foundation for any representation to such effect, and he avers that he is, and long has been the owner of real and personal property in the city of Philadelphia, State of Pennsylvania, subject to execution, exceeding in value the sum of $10,000.00, which said city and State is alleged also to be the place of residence of the said Elias Wineland, complainant herein.

JOHN E. REYBURN.

Subscribed and sworn to before me this 14th day of June, A. D. 1902.

WM. H. DENNIS,
United States Commissioner D. C.

[NOTARIAL SEAL.]

55 *Affidavit of John K. Little.*

Filed Jun- 30, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, John E. Reyburn, John K. Little, and Robert M. Moore, Defendants. } Equity. No. 23352.

John K. Little, one of the defendants herein, being duly affirmed deposes and says: That he is a resident of the city of Philadelphia, State of Pennsylvania; that he has lived in said city for 54 years; that he is the owner in his own right of real estate in said city, over and beyond his debts or liabilities, and subject to levy and execution, in an amount exceeding $5000.; he denies that he is insolvent, or that he ever has been insolvent, or that there is now, or ever has been the slightest ground for any statement to such effect.

JOHN K. LITTLE.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

Subscribed and affirmed to before me this 25th day of June A. D. 1902.

[NOTARIAL SEAL.] JOSEPH THOMASSON,
Notary Public, 3944 *Lancaster Ave., Philada., Pa.*

Commission expires Jan. 19th, 1903.

56 *Order Discharging Rule and Denying Injunction.*

Filed Jun- 30, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } In Eq. No. 23352.

This cause coming on to be heard upon the rule to show cause herein issued on the 9th day of June 1902 and the response thereto, and the same having been considered by the court and argued by counsel, representing the respective sides, it is by the court, this 30th day of June 1902, ordered that the said rule be, and the same hereby is discharged, and the application for an injunction *pendente lite* and the appointing of a receiver is denied.

A. B. HAGNER,
Asso. Justice.

57 *Plea of Defendants Wagenhurst, Reyburn, and Little.*

Filed Jul- 28, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
v.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, John E. Reyburn, John K. Little, Robert M. Moore, Defendants. } Equity. No. 23352.

Plea by defendants Wagenhurst, Reyburn, and Little.

The defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, by protestation, not confessing or acknowledging all or any of the allegations of the bill of complaint herein filed to be true, as therein alleged, do plead to the said bill of complaint, and for plea to the whole of said bill do say as follows:

That heretofore, and before the complainant exhibited his present bill in this court, to wit, on the 6th day of September, 1900, the said complainant filed his bill of complaint being original bill for injunction in this court in equity cause numbered 21,698, against this defendant Ellwood O. Wagenhurst and said Ellis H. Roberts, Treasurer of the United States and *ex-officio* commissioner of the sinking fund of the District of Columbia; and thereafter the said complainant, on November 15, 1900, filed in said court his amended bill of complaint wherein he added as parties defendant in said cause the now defendants herein, namely, John E. Reyburn and John K. Little.

58 All of said defendants were sued in their own rights, respectively, excepting the said Roberts, who was sued as Treasurer and *ex-officio* commissioner aforesaid, and the complainant sued in his own right.

And in such pleadings in said cause the said complainant prayed that the sole and absolute ownership of the whole of certain moneys, bonds and interest in the hands of the United States Treasurer and *ex-officio* commissioner aforesaid, to wit, the sum of $1517.37 (subject to a deduction of $22.50) and $1609.31 under two certain sewer contracts numbered 2361 and 2390, respectively, between Robert M. Moore (now defendant) and said Ellwood O. Wagenhurst as co-partners trading under the firm name of R. M. Moore & Co. and the District of Columbia, might be declared and confirmed in him, the said complainant, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with said moneys, bonds and interest, or any part thereof.

And the said complainant Wineland in said pleadings in said cause, equity No. 21,698, sued for the said cause of action, and claimed title to all of said moneys, bonds and interest by virtue of a certain instrument of writing bearing date December 21, 1898, alleged to be an assignment by Robert M. Moore in the name of the said firm, which said instrument and said contracts Nos. 2361 and 2390 are the identical agreements which are set out and referred to by the said complainant in his present bill of complaint. To which original and amended bills, in equity No. 21,698, the said defendants (who are now defendants) viz.: Wagenhurst, Reyburn and Little, duly filed answers, and afterwards, to wit, such other pro-

59 ceedings were had in said cause as that the same was twice set down for hearing on bill and answer, first by complainant on his original bill, and a second time by complainant on his amended bill, and being heard and considered on the merits by this honorable court a decree was entered therein in favor of the said complainant, whereupon an appeal was taken to the Court of Appeals of the District of Columbia, on November 15, 1901 by the defendants in said cause. And said appeal being duly heard, a decree was rendered by the said Court of Appeals on May 7, 1902, directing that the said bill of complaint be remanded to this honorable court for dismissal, with costs upon the complainant; and later, on June 9, 1902, a final decree was entered in this honorable court dismissing

the bill in said equity cause No. 21,698, with costs, as ordered. And for their costs in that behalf the defendants Wagenhurst, Reyburn and Little were awarded execution as at law against the said complainant Elias Wineland (who is now complainant). All of which will more fully and at large appear by reference to the proceedings, record and decree in said equity cause No. 21,698, which said cause is here specially referred to and prayed to be read and considered as a part hereof.

The defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little further show that the said Elias Wineland in the said equity cause No. 21,698 sued the same parties defendant now sued herein, save Robert M. Moore who is also made a party defendant in this suit, in respect of the identical subject matter embraced in the present bill of complaint, and in said former suit it was sought, among other things, to obtain a decree declaring and confirming to
the said Elias Wineland the sole and absolute ownership "in
60 his own right" of the whole and all of the said retained
moneys, bonds and interest under contracts Nos. 2361 and 2390 as aforesaid, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from in any manner interfering or intermeddling with said moneys, bonds and interest, or any part thereof, in the hands of the said Treasurer and *ex-officio* commissioner, as aforesaid. That the said cause was decided adversely to the said complainant by the Court of Appeals, though said complainant, on May 22, 1902, filed a motion for a modification of said decree, supported by an elaborate brief and affidavits, in which it was prayed, among other things, that the said decree be so modified by the Court of Appeals as to permit the complainant to amend his bill, or "to make the dismissal of the bill to be without prejudice to the right of the complainant to institute another suit," for the purpose of supplying new allegations and proof thereof; and the said motion so to modify was on June 6, 1902 refused and denied by the said court.

That notwithstanding the said decree of the Court of Appeals, the refusal of said court to modify the same, and the final decree entered in said cause No. 21,698 in this honorable court as ordered dismissing the bill of complaint therein, the said Elias Wineland has instituted the present equity cause No. 23352, which involves the identical subject matter above referred to, and is between the same parties, suing in the same capacities, in respect of the same alleged title to the same property sued for in said former suit; and the defendants herein are advised, and therefore aver, that they should not
be further subjected to the expense, annoyance and vexation
61 of again defending the title of the said John E. Reyburn and
John K. Little to the said moneys, bonds and interest, or the rights of the said Ellwood O. Wagenhurst in the premises.

The said defendants file herewith as a part hereof a copy of the record in the Court of Appeals in said above mentioned cause No. 21,698; also a copy of the motion made and filed by the complainant for a modification of the decree made by the Court of Appeals;

and a copy of the briefs used in the said court by the parties adversary to said complainant Wineland, including a printed copy of their statement in opposition to the motion by said Wineland for a modification.

All which the said defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little do aver to be the truth; and the matters and things set forth in the said former proceedings, record and decree, the said defendants do aver and plead in bar of complainant's present bill of complaint, and pray the judgement of this honorable court whether they shall be compelled to make answer to the complainant's said bill herein filed, and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

ELLWOOD O. WAGENHURST.
JOHN E. REYBURN.
JOHN K. LITTLE.

This plea in the judgment of counsel is well founded and is not interposed for delay.

J. ALTHEUS JOHNSON,
ELWOOD O. WAGENHURST.

DISTRICT OF COLUMBIA, *ss:*

I, Ellwood O. Wagenhurst one of the defendants above named, being duly sworn, depose and say that I have read the foregoing plea by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe to be true.

ELLWOOD O. WAGENHURST.

62 Subscribed and sworn to before me this 28th day of July, A. D. 1902.

J. R. YOUNG, *Clerk,*
By R. J. MEIGS, *Ass't Cl'k.*

STATE OF CONNECTICUT,
County of New London, } *ss:*

I, John E. Reyburn, one of the defendants above named, being duly sworn, depose and say that I have read the foregoing plea by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe to be true.

JOHN E. REYBURN.

Subscribed and sworn to before me this 26 day of July A. D. 1902.

[NOTARIAL SEAL.] LEONTINE A. ST. GERMAIN.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

I, John K. Little, one of the defendants above named, being duly affirmed, depose and say that I have read the foregoing plea by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and the matters and things therein stated on information and belief, I believe to be true.

JOHN K. LITTLE.

Subscribed and affirmed before me this 24th day of July A. D. 1902.

[NOTARIAL SEAL.] JOSEPH THOMASSON,
Notary Public, 3944 *Lancaster Ave., Philada., Pa.*

Commission expires Jan. 19th, 1903.

63 *Motion to Dismiss Bill.*

Filed Aug. 13, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

Defendants Wagenhurst, Reyburn and Little have this day filed their plea in the above entitled cause, of which take notice.

July 28, 1902.

(Signed) J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Counsel for Def'ts.

To Thomas M. Fields, counsel for complainant.

DISTRICT OF COLUMBIA, *ss:*

Ellwood O. Wagenhurst, on oath, says that the foregoing is a correct copy of a notice which he mailed post-paid to "Thomas M. Fields, attorney at law, No. 317 4½ St., N. W., Washington, D. C.," on the forenoon of July 28, 1902.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 13 day of Aug. A. D. 1902.

J. R. YOUNG, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

64 Filed Aug. 13, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

Come now the defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, and move the court for an order dismissing this cause, the said defendants having filed their plea herein on the 28th day of July, 1902, and so notified the complainant, and the complainant having neither replied to the said plea nor set the same down for argument.

ELLWOOD O. WAGENHURST,
Counsel for Def'ts.

Thomas M. Fields, Esq., counsel for complainant:

Please take notice that on Wednesday next, August 13, 1902, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we will call up the above motion for consideration by the court (equity).

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Counsel for Def'ts.

August 9, 1902.

65 *Motion for Pro Confesso Order.*

Filed Aug. 13, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Comes here now the complainant, by Mr. Thomas M. Fields his solicitor, and moves the court for an order taking the bill for confessed as against the defendants, Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, for default in pleading to the bill in conformity with the rules of this court.

THOMAS M. FIELDS,
Solicitor for Complainant.

Notice.

The defendants, Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, will take notice that the above motion will be pre-

sented to equity court, No. 1, on Wednesday, August 12, 1902, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

THOMAS M. FIELDS,
Solicitor for Complainant.

To Messrs. J. A. Johnson and E. O. Wagenhurst, solicitors for above-named defendants.

Service of copy of foregoing motion and notice, acknowledged this 9th day of August, 1902.

J. ALTHEUS JOHNSON,
Solicitor for Above-named Defendants.

66 *Order Denying Motions to Dismiss & for a pro Confesso and Giving Leave to Amend Affidavit to Plea.*

Filed Aug. 13, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELWOOD O. WAGENHURST ET AL. } Eq. No. 23352.

This cause coming on to be heard upon the motion to dismiss made by the defendants and the motion for a *pro confesso* made by the complainant, it is, by the court, this 13th day of August, 1902, ordered that the said motions be, and they hereby are, denied, and leave is given for the defendants to amend the affidavit in verification of the plea herein filed by adding to the said affidavit the statement that the said plea is not interposed for delay and otherwise to amend as they may be advised.

HARRY M. CLABAUGH, *Justice.*

67 *Affidavit of Defendant Wagenhurst.*

Filed Aug. 15, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

DISTRICT OF COLUMBIA, *ss:*

Leave of the court having first thereto been granted, Ellwood O. Wagenhurst, one of the defendants in the above entitled cause, on oath, says that the plea herein filed by John E. Reyburn, John K.

Little and himself is not interposed for delay, and he says further that he amends his affidavit in verification of said plea by adding to said affidavit the words that the said plea is not interposed for delay.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 15 day of August, A. D. 1902.

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

Affidavit of John K. Little.

Filed Aug. 15, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, } *ss:*

68 Leave of the court having first thereto been granted, John K. Little, one of the defendants in the above entitled cause, on affirmation, says that the plea herein filed by John E. Reyburn, Ellwood O. Wagenhurst and himself is not interposed for delay, and he says further that he amends his affidavit in verification of said plea by adding to said affidavit the words that the said plea is not interposed for delay.

JOHN K. LITTLE.

Subscribed and affirmed before me this 14th day of August, A. D. 1902.

[NOTARIAL SEAL.]

JOSEPH THOMASSON,
Notary Public,
3944 *Lancaster Ave., Philada., Pa.*

Commission expires Jan. 19th, 1903.

Certificate of Counsel.

Filed Aug. 15, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

Counsel hereby certify that the plea of Ellwood O. Wagenhurst, John E. Reyburn and John K. Little herein filed is, in their opinion, well founded in law.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Counsel for Def'ts.

69 *Motion for pro Confesso Notice.*

Filed Aug. 20, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Comes here now the complainant, by his solicitor, and moves the court for an order *pro confesso* against the defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, for their continued failure to plead to or answer the bill in conformity with the rules and practice of this court, notwithstanding the papers filed under the order of August 13, 1902.

THOMAS M. FIELDS,
Solicitor for Complainant.

The above-named defendants will take notice that the foregoing motion will be presented to equity court, No. 1 on Monday August 25, 1902, at ten (10) o'clock a. m., or as soon thereafter as counsel can be heard.

THOMAS M. FIELDS,
Solicitor for Complainant.

To Messrs. J. Altheus Johnson, Ellwood O. Wagenhurst, solicitors for aforesaid defendants.

Service Augt. 19 / 02.

J. ALTHEUS JOHNSON.

70 *Order Overruling Motion for pro Confesso.*

Filed Aug. 25, 1902.

In the Supreme Court of the D. C.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Eq. No. 23352.

This cause coming on to be again heard on the motion for a *pro confesso* herein filed on the 20th day of August 1902, it is by the court, this 25th day of August, A. D. 1902, ordered that the said motion be, and the same hereby is, overruled.

HARRY M. CLABAUGH, *Justice.*

Præcipe to Calendar.

Filed Aug. 27, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Hereby expressly reserving all of his objections to the form of the plea filed herein on July 28, 1902, the certificates and affidavits thereto and thereafter, and the failure of the defendants Wagenhurst, Reyburn and Little to plead in compliance with the provisions of equity rules 28 and 29 of this court, and the general rules of equity pleading and practice governing pleas in equity, and
71 without prejudice to such objections and his rights in the premises, the complainant hereby sets down the said plea to be argued, and directs the clerk to calendar this cause for argument of the said plea as to the sufficiency thereof both in form and substance, under the provisions of equity rule 30 of this court.

THOMAS M. FIELDS,
Solicitor for Complainant.

Amendment to Affidavit of John E. Reyburn.

Filed Dec. 5, 1902.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

DISTRICT OF COLUMBIA, *ss:*

Leave of the court having first thereto been granted, John E. Reyburn, one of the defendants in the above entitled cause, on oath, says that the plea herein filed by Ellwood O. Wagenhurst, John K. Little and himself is not interposed for delay, and he says further that he amends his affidavit in verification of said plea by adding to said affidavit the words that the said plea is not interposed for delay.

JOHN E. REYBURN.

Subscribed and sworn to before me this 5th day of December, A. D. 1902.

RUTLEDGE WILLSON,
[NOTARIAL SEAL.] *Notary Public, D. C.*

72 *Order Overruling Plea and Requiring Answer.*

Filed Jan. 15, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

This cause came on to be heard at this term of the court upon the plea of the defendants Ellwood O. Wagenhurst John E. Reyburn and John K. Little, to the bill of complaint, which plea the complainant duly set down for hearing under the provisions of equity rule No. 30 of this court; and the said plea having been argued by counsel for the respective parties, and considered by the court, it is, this fifteenth day of January, A. D. 1903, ordered that the said plea be and it is hereby overruled, with costs to the complainant arising from the said plea, and that the said defendants and each of them shall answer the said bill within ten days from the date hereof.

By the court:

A. B. HAGNER,
Asso. Justice.

73 Filed Jan'y 23, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
v.
ELLWOOD O. WAGENHURST, ELLIS H. ROBERTS, JOHN E. Reyburn, JOHN K. Little, Robert M. Moore, Defendants. } Equity. No. 23352.

Joint and Several Answer by the Defendants Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little.

The defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, now and at all times hereafter saving and reserving to themselves and each of them all right of exception to the bill of complaint herein filed, and not waiving or relinquishing the plea by them herein made, but saving and reserving to themselves and each of them all the benefit and advantage of the said plea, do defer to the order made by the court herein on the 15th day of January 1903, requiring them to make answer to the said bill of complaint, and, for answer thereunto, or unto so much and such parts thereof as they are advised it is material or necessary for them or either of them to make answer unto, they, the said defendants, severally answering, do say as follows

The allegations contained in paragraphs 1 and 2 of the said bill of complaint are admitted to be true.

74 As to the allegations contained in each and every of the remaining paragraphs of the said bill the said defendants say as follows:

That heretofore, and before the complainant exhibited his present bill in this court, to wit, on the 6th day of September 1900, the said complainant filed his bill of complaint in this court, being original bill for injunction in equity numbered 21,698, against this defendant Ellwood O. Wagenhurst and the said Ellis H. Roberts, Treasurer of the United States and *ex-officio* commissioner of the sinking fund of the District of Columbia; and thereafter the said complainant, on November 15, 1900 filed in said court his amended bill of complaint wherein he added as parties defendant in said cause the now defendants herein, namely John E. Reyburn and John K. Little. All of said defendants were sued in their own rights, respectively, excepting the said Roberts, who was sued as Treasurer and *ex-officio* commissioner as aforesaid, and the complainant sued in his own right.

And in the pleadings in said cause the said complainant prayed that the sole and absolute ownership of the whole of certain moneys, bonds and interest in the hands of the defendant Ellis H. Roberts, United States Treasurer and *ex-officio* commissioner as aforesaid, to wit, the sum of $1517.37 (subject to a deduction of $22.50) and

$1609.31 under two certain sewer contracts numbered, respectively, 2361 and 2390 between Robert M. Moore (now defendant) and said Ellwood O. Wagenhurst as co-partners trading under the firm name of R. M. Moore & Co. and the District of Columbia, might be
75 declared and confirmed in him, the said complainant, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from interfering or intermeddling in any manner with said money, bonds and interest, or any part thereof.

And the said Elias Wineland, complainant in said pleadings in said cause, equity No. 21,698, sued for the said cause of action, and claimed title to all of said moneys, bonds and interest by virtue of a certain instrument of writing bearing date December 21, 1898, alleged to be an assignment by Robert M. Moore in the name of the said firm, which said instrument and said contracts Nos. 2361 and 2390 are the identical agreements which are set out and referred to by the said complainant in his present bill of complaint. To which original and amended bills, in equity No. 21,698, the said defendants (who are now defendants) viz: Wagenhurst, Reyburn and Little, duly filed answers, and afterwards such other proceedings were had in said cause as that the same was twice set down for hearing on bill and answer, first by complainant on his original bill, and a second time by complainant on his amended bill, and being heard and considered on the merits by this honorable court a decree was entered therein in favor of the said complainant, whereupon an appeal was taken to the Court of Appeals of the District of Columbia, on November 15, 1901 by the defendants in said cause. And said appeal being duly heard, a decree on the merits of the said cause was rendered by the said Court of Appeals on May 7, 1902, directing that the said bill of complaint be remanded to this honorable court for dismissal, with costs upon the complainant; and later, on June 9, 1902, a final decree was entered in this honorable
76 court dismissing the bill in said equity cause No. 21,698, with costs, as ordered. And for their costs in that behalf the defendants Wagenhurst, Reyburn and Little were awarded execution as at law against the said complainant Elias Wineland (who is now complainant). All of which will more fully and at large appear by reference to the proceedings, record and decree in said equity cause No. 21,698, which said cause is hereby specially referred to and prayed to be read and considered as a part hereof. A certified copy of the final decree in said cause is herewith filed, marked "Exhibit to Answer of W., R. and L. No. 1."

The defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little further show that the said Elias Wineland in the said equity cause No. 21,698 sued the same parties defendant now sued herein, save Robert M. Moore who is also made a party defendant in this suit, in respect of the identical subject matter embraced in the present bill of complaint, and in said former suit it was sought, among other things, to obtain a decree declaring and confirming to the said Elias Wineland the sole and absolute ownership "in his

own right" of the whole and all of the said retained moneys, bonds and interest under contracts Nos. 2361 and 2390 as aforesaid, and that the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little be enjoined *pendente lite* and perpetually from interfering or intermeddling in any manner with said moneys, bonds and interest, or in any part thereof, in the hands of the said Roberts, Treasurer and *ex-officio* commissioner as aforesaid. That the said cause on its merits was decided adversely to the said complainant by the Court of Appeals, though said complainant, on May 22,
77 1902, filed a motion for a modification of said decree, supported by an elaborate brief and affidavits, in which it was prayed, among other things, that the said decree be so modified by the Court of Appeals as to permit the complainant to amend his bill, or else "to make the dismissal of the bill to be without prejudice to the right of the complainant to institute another suit," for the purpose of supplying new allegations and proof thereof; and the said motion so to modify was on June 6, 1902 refused and denied by the said court.

That notwithstanding the said decree of the Court of Appeals, the refusal of said court to modify the same, and the final decree entered in said cause No. 21,698 in this honorable court as ordered dismissing the bill of complaint therein, the said Elias Wineland has instituted the present equity cause No. 23,352, which involves the identical subject matter above referred to, and is between the same parties, suing in the same capacities, in respect of the same alleged title to the same property sued for in said former suit; and the defendants herein are advised, and therefore aver, that they should not be further subjected to the expense, annoyance and vexation of again defending the title of the said John E. Reyburn and John K. Little to the said moneys, bonds and interest, or the rights of the said Ellwood O. Wagenhurst in the premises.

The answers of these defendants in the former suit, equity No. 21,698, were full and complete, setting forth all the facts affecting the matter in controversy, and no new or additional facts have come to the knowledge of the complainant since the filing of those
78 answers, but every allegation made by the complainant in the present suit different from his allegation as made in the former suit is about a fact of which he had as full knowledge when he filed his amended bill in the former suit as he had when the present bill was filed. For instance, he avers in the present bill a consideration of two thousand dollars for the assignment he received from Robert M. Moore, whereas in the former suit he merely averred a valuable consideration and let it rest at ten dollars. Seeing from the opinion of the Court of Appeals that he was lacking in the matter of his consideration (though, as a matter of fact, that court did not rest its decision upon that point, but declared that Robert M. Moore in December, 1898 did not have in the subject matter of the litigation any interest whatever capable of transfer by him to Elias Wineland)—seeing, say these defendants, what the Court of Appeals had said about a consideration, the complainant Wineland in his affi-

davit supporting the motion in that court for a modification of its decree, declared that he had paid $2000 in cash, and so, in like manner, wherever that court in its opinion had pointed out a lack of facts to support his contention, he indicated, by the affidavits supporting his motion for leave to amend or for dismissal without prejudice, his readiness to make whatever allegations might be necessary to his case and to support the same with testimony; and there is no averment or allegation made in the present bill new, different or additional to what was in the former bill, which was not pressed before the Court of Appeals in the application made to that court for a modification of its decree in the former suit.

These defendants are advised, and they so aver, that the
79 complainant is not at liberty, after he has once litigated a claim and lost, to readjust his allegations (and consequent proof) and thereby litigate again with the same parties concerning the same subject matter; and they are advised, and so aver, that the complainant, under such circumstances, cannot, by simply varying his allegations, impose upon these defendants the obligation to answer anew concerning a subject matter and issues already finally passed upon and decreed between them in a former suit.

All which matters and things the said defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct, and they pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

ELLWOOD O. WAGENHURST.
JOHN E. REYBURN.
JOHN K. LITTLE.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST, *Solicitors.*

DISTRICT OF COLUMBIA, *ss:*

I, Ellwood O. Wagenhurst, one of the defendants above named, first duly sworn, depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and that the matters and things therein stated on information and belief, I believe to be true.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 21st day of January, A. D. 1903.

JOHN R. YOUNG, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

80 DISTRICT OF COLUMBIA, *ss:*

I, John E. Reyburn, one of the defendants above named, first duly sworn, depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and

things therein stated on my personal knowledge are true, and that the matters and things therein stated on information and belief, I believe to be true.

JOHN E. REYBURN.

Subscribed and sworn to before me this 21st day of January, A. D. 1903.

JOHN R. YOUNG, *Clerk*,
By L. P. WILLIAMS, *Ass't Clerk.*

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

I, John K. Little, one of the defendants above named, first duly affirmed, depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated on my personal knowledge are true, and that the matters and things therein stated on information and belief, I believe to be true.

JOHN K. LITTLE.

Subscribed and affirmed before me this 22nd day of January, A. D. 1903.

JOSEPH THOMASSON,
Notary Public, 3944 *Lancaster Avenue*,
Philadelphia, Pa.

[SEAL.]

Commission expires January 19, 1907.

81 EXHIBIT TO ANSWER OF W., R. & L. No. 1.

Filed Jan. 23, 1903.

Filed Jun- 9, 1902. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST, JOHN E. Reyburn, and John K. Little, Defendants. } Equity. No. 21698, Docket 49.

The Court of Appeals having issued its mandate in the appeal prosecuted herein to that court, and the said mandate having been filed in this court, it is, by the court this 9th day of June, A. D. 1902, as authorized and directed by the said mandate, adjudged, ordered and decreed that the bill in this cause be, and the same hereby is, dismissed, with costs. And for their costs in this behalf incurred, to be taxed by the clerk of this court, the defendants

herein shall have execution as at law against the complainant Elias Wineland. And the clerk of this court having been directed to transmit to Ellis H. Roberts, Treasurer of the United States and *ex officio* commissioner of the sinking fund of the District of Columbia, a duly certified copy of the decree herein made on November 15, 1901 (from which decree the above mentioned appeal was prosecuted), the said clerk will now transmit to the said Roberts, Treasurer and *ex officio* commissioner as aforesaid, a duly certified copy of this decree, which reverses the former one and dismisses the cause.

A. B. HAGNER,
Asso. Justice.

A true copy
Test:

J. R. YOUNG, *Clerk*,
[SEAL.] By L. P. WILLIAMS, *Ass't Clerk.*

82 Filed Feb. 3, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352, Docket No. 52.

Exceptions to Answer.

1. Comes here now the complainant Elias Wineland, by his solicitor, and excepts to the answer of the respondents Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, to the bill of complaint herein, for that the said answer is insufficient in that the said respondents have not answered fully, nor at all, the material allegations and charges of the said bill made in paragraphs three (3) to forty (40) thereof, both inclusive.

2. The complainant further excepts to the said answer, save only so much thereof as answers paragraphs one (1) and two (2) of the said bill, for insufficiency, in that the defense therein set up as a bar and claimed as such is insufficient, and is not supported by proper averments and exhibits, nor by a proper answer.

Wherefore the complainant prays that the said respondents may in such respects be compelled to put in a full and complete answer to the said bill.

3. The complainant further excepts to the said answer for
83 impertinence, save only so much thereof as answers the first and second paragraphs of the said bill, for that the matters and things set forth in the said answer are not responsive but irrelevant to the said bill, and form no sufficient defense to the case for relief made thereby, and are not supported by proper averments, nor by a proper answer; and especially so, as the said defense is predicated

exclusively of the records and proceedings and exhibit referred to in the said answer, yet the said exhibit is no part of the said answer, and cannot be considered, because it was not filed with the said answer, but thereafter and without any leave of this court or notice to the complainant, as will more fully appear by reference to the record and proceedings herein and the affidavit hereto annexed of the complainant's solicitor; and the said records and proceedings have neither been filed nor exhibited with the said answer.

Wherefore the complainant prays that the matter of the said answer, save only as aforesaid, may be expunged therefrom and suppressed.

THOMAS M. FIELDS,
Solicitor for Complainant.

Affidavit.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the complainant's solicitor in this suit; that affiant personally examined the clerk's docket entries in this case on January 23, 1903,
84 and from them he then first learned that the answer hereinbefore excepted to had been filed on that date; that the said docket entries did not then show that any exhibit had been filed with the said answer; that the docket entry in Mr. Meigs' handwriting relating to the filing of the said answer was then as follows: "1903. Jan'y 23. Answer of def'ts Nos. 1, 3, 4, to bill;" that thereupon affiant examined the said answer itself and the other papers in the cause, and found no exhibit, such as the said answer mentions, to or with it or among them; that he then ordered a copy of the said answer in the clerk's office, which copy was issued to him on January 26, 1903, but no exhibit was furnished with it; that he then again examined the docket entries in the case, and found that on the same line and under the same date on which the entry above mentioned appeared, and to it, had been added in Mr. Williams' handwriting the following entry: "& exhibit (& copy) filed;" that on January 24, 1903, affiant received through the mail a written notice from the respondents' solicitors advising him that the said answer had been filed on January 23, 1903, but making no mention whatever of the said exhibit which the said answer, under the oaths of the respondents, states "is herewith filed, marked Exhibit to Answer of W., R. and L. No. 1;" that the said exhibit was not in fact filed with the said answer, but was filed later on the same day and after affiant had ordered a copy of the said answer from the clerk's office; and that the said exhibit was filed after the said answer and without any leave of the court or notice to the complainant or affiant, and therefore in violation of the rules, practice and procedure of this court.

And further affiant saith not.

THOMAS M. FIELDS.

85 Subscribed and sworn to before me this third day of February, 1903.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

86 *Affidavit of Ellwood O. Wagenhurst.*

Filed February 5, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } In Equity. No. 23352.

Ellwood O. Wagenhurst, who is one of the defendants and also one of the attorneys in these proceedings, on oath, says as follows:

As to the affidavit made by Thomas M. Fields, in connection with the exceptions he has filed to the answer herein, I wish to state as follows:—

When the answer, on the 23rd day of January 1903, was handed to the clerk to be filed, the type-writer in the clerk's office had not made the copy of the final decree of this court in equity cause No. 21,698. An hour or two later, on the same day, when the copy had been completed and verified, it was properly endorsed (by Mr. Johnson, of counsel in the case) and handed to the clerk to be filed as an exhibit to the answer (the answer having referred to it as an exhibit) and it was filed accordingly.

This affiant believes that this court will take judicial notice of its own records; he believes that the answer herein filed contains such reference to the proceedings and decree of this court in equity cause No. 21,698 as would cause the court (independently of either the exhibit or its filing) to ascertain for itself what it did in the former proceeding; and he believes therefore that the attaching of a
87 verified copy of the decree in the former case as an exhibit to the answer in this case, while a proper and convenient thing to do, was not essential or of the substance of the matter.

This affiant avers also that the copy of the answer made by the clerk for the said Fields was not made, or begun to be made, on the 23rd day of January (the day the answer and exhibit were filed) and was not furnished to the said Fields until the 26th day of January; and this affiant avers also that if the said Fields had asked the clerk for a copy of the exhibit referred to in the said answer (and had tendered the proper fees therefor, as he had to do for a copy of the answer itself before he got it) he would have received a copy of the said exhibit. And the said Fields knows, or ought to know, that it is not the custom in the clerk's office in making copies for attorneys of bills and answers to make copies of the exhibits also, unless copies of the latter are specially requested.

The affiant says further that such quibbling as seeks to have it appear that the rules of practice observed in a court of justice were disregarded, and a serious fault committed, when the exhibit herein was filed an hour after the answer had been filed in which the exhibit was described and referred to, is the veriest nonsense and such trifling as ought not to have tolerance in a court of justice. It is, however, in line with the tactics which the bringers of this suit are endeavoring to pursue, namely to raise a dust and make a noise about immaterial matters of practice and procedure in the hope that they will thereby distract attention and divert the court from the true and meritorious question in the case, to wit, that this suit
88 is about a subject matter concerning which a final adjudication has already been had in this court between the parties to this procedure. The Court of Appeals of the District of Columbia, in the former suit, equity No. 21,698, refused to grant leave to the complainant to amend his bill and refused also to permit the dismissal of the bill to be without prejudice; and still the complainant, in almost open and flagrant disregard of the action of the court in that suit, immediately turned about and filed the present suit, and procured the Treasurer of the United States to delay payment of the moneys in his hands until the end of the present suit, the purpose of the complainant in all this being to induce these defendants, if possible, to agree to some sort of a compromise settlement with him, rather than undergo the vexatious delays, annoyances and expense of another long drawn out legal procedure before receiving the moneys now past due in the hands of the Treasurer.

As evidence that the defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little do not submit to the exceptions herein filed to their answer, and do not desire, in the light of the exceptions so filed, to amend their answer, they send a copy of this affidavit, simultaneously with its filing, to the said Fields, with the information that he need not delay for the ten days allowed to the defendants under the rule of court, but that he may forthwith set his exceptions down for hearing.

ELLWOOD O. WAGENHURST.

DISTRICT OF COLUMBIA, *ss*:

Subscribed and sworn to before me this 5th day of February, 1903.

J. R YOUNG, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

89 *Motion to Expunge Parts of Affidavit of E. O. Wagenhurst, &c.*

Filed Feb. 11, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Comes here now the complainant, and moves the court as follows:

1. To strike out all that part of the affidavit of the defendant Wagenhurst, filed herein on February 5, 1903, beginning with the words "This affiant believes," etc., and ending with the words "the substance of the matter," for that the same is wholly argumentative, irrelevant and impertinent.

2. To expunge from the said affidavit all that part thereof beginning with the words "The affiant says further that such," etc., and ending with the words "in the hands of the Treasurer," for that the same is scandalous, and also wholly irrelevant and impertinent.

THOMAS M. FIELDS,
Solicitor for Complainant.

The defendant Wagenhurst will take notice that the foregoing motion will be called to the attention of the court upon the hearing of the complainant's exceptions to the answer of the defendants Wagenhurst, Reyburn and Little.

THOMAS M. FIELDS,
Solicitor for Complainant.

90 In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says as follows:

I did not order a copy of the exhibit or decree referred to in the answer filed herein on January 23, 1903, when I ordered a copy of the said answer, for the sole reason that no such exhibit had then been filed; but I was informed that a copy of said decree had been ordered. If such exhibit had then been filed I should have ordered a copy of it also. I did not know that said exhibit had been filed until January 26, 1903, when the copy of said answer was handed to me in the clerk's office. Thereupon I at once ordered a copy of

said exhibit, which copy was furnished to me by the clerk on the said January 26, 1903. In view of the fact that the defendants Wagenhurst, Reyburn and Little, by their counsel, stated in open court, when their plea herein was overruled, that they elected to stand upon it and declined to answer and that the court might then pass a final decree against them, and yet changed their minds and answered within the time allowed them by the court to answer, the complainant cannot undertake to act or rely upon the declaration in Mr. Wagenhurst's affidavit herein of February 5, 1903,
91 that said defendants will not submit to the complainant's exceptions to their said answer, but he will await the expiration of the time allowed them to submit by equity rule 57 of this court, as they may again change their minds and submit to the said exceptions before the expiration of such time. But if they shall not so submit within the said time, the complainant will then forthwith set down his said exceptions for hearing, as provided by the said equity rule 57.

Mr. S. McComas Hawken has made the following statement regarding the said decree, answer and copies:

That he is now, and has been for the past three years, the superintendent of the files and chief copyist in the office of the clerk of this court; that he has read the affidavits of Thomas M. Fields, filed herein on February 3, 1903, and of Ellwood C. Wagenhurst, filed herein on February 5, 1903, and has personal knowledge of the facts relating to the copying and filing of the answer and decree or exhibit therein referred to, and of the orders for such copies; that the copy of said decree was both ordered from and made by him personally on January 23, 1903; that it was not filed with nor attached to the said answer, nor was it ordered until after said answer had been filed; that the copy of said answer was ordered by Mr. Fields on Friday, January 23, 1903, before the said decree was copied; that he then told Mr. Fields that a copy of said decree had been ordered, but not then made, to which Mr. Fields replied that he only wanted a copy of what had been actually filed at that time, namely, the said answer, as the said copy of said decree did not then constitute any part of said answer; that the said answer was fully copied for Mr. Fields on Friday, January 23, 1903, but was not called for
92 until Monday, January 26, 1903; that the said decree was also ordered and copied as aforesaid on January 23, 1903, but copied after the copy of said answer had been both ordered and begun; that the copyist's endorsement on said answer, made when the copy thereof was completed, shows as follows: "Copied Jan. 23," that the copy of said decree was ordered of him by Mr. Wagenhurst personally, who then stated to him that he had already filed said answer; that at his request he then got for him the jackets containing the said papers and also the answer which he then showed to him stating that the copy which he was to make was to be "attached" as an exhibit to said answer; that at his further request, he then got for him the papers in equity No. 21698, from which he got the

said decree of which he desired him to make a copy, and handed the same to him to copy; that the said answer then bore the clerk's file mark; that the fact is that the said copy of said answer was both begun and completed on January 23, 1903, as hereinbefore stated; that Miss Julia Young, who, by his direction, copied the said answer for Mr. Fields, is now temporarily absent from the District of Columbia; that the said endorsement thereon is in her handwriting; that the said answer was filed between 10 and 10.30 a. m. on January 23, 1903; that the copy of the said decree was made about 2 p. m. and was handed to Mr. Johnson and by him filed about 3 p. m. on said date.

And further affiant says that Mr. Hawken will testify to the correctness of the said statement if required.

THOMAS M. FIELDS.

Subscribed and sworn to before me this 11th day of February, A. D. 1903.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

93 Filed February 16, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } In Equity. No. 23352.

Affidavit of Defendant Wagenhurst.

DISTRICT OF COLUMBIA, *ss:*

Ellwood O. Wagenhurst, on oath, says that since filing the affidavit he made herein on the 5th instant he has learned as follows:

When Thomas M. Fields first saw the answer, filed herein on January 23, 1903, he saw it in the hands of a copyist in the clerk's office who had beside him at the time the decree of the court in equity cause No. 21,698; and when the copyist showed the answer to the said Fields, who had been diligently seeking to see it in another part of the office, he (the copyist) informed the said Fields that a copy of the decree in equity cause 21,698 had been ordered to be made to accompany the answer as an exhibit, but that he (the copyist) had been too busy to make the copy, the original decree being then before him to be copied and exhibited to the said Fields at the time. And when the said Fields then and there asked the copyist to make for him (the said Fields) a copy of the said answer (no formal order for a copy was ever put upon record by the said Fields) the copyist inquired expressly of the said Fields whether he (the said Fields) desired a copy of the exhibit and the said Fields

in reply said that he did not want a copy of the exhibit but
94 a copy of the answer only.

The affiant by making this supplementary statement to his affidavit of the 5th instant, does not mean to be betrayed into consideration of an immaterial and unimportant matter, but only to state additional facts concerning such a matter in order that the dilatory tactics of the complainant may be more apparent by which he seeks to delay and avoid the true and meritorious question in this case, to wit, whether there has been a former adjudication concerning the matter set forth in this suit.

The said Fields, in the affidavit supporting a motion he filed herein on the 11th instant, has generously declined to permit the defendants Wagenhurst, Reyburn and Little to shorten the ten days allowed them for amendment in the face of exceptions, putting his generosity upon the ground that the said defendants had changed their minds herein and answered after they had stated in open court their willingness to stand upon their plea. If the matter were material, this affiant would state what the facts were in that regard, namely, that the said Fields, when it came to drawing a decree, was at first unwilling for the said defendants, as the basis of a final decree, to write down in their own words their attitude with reference to their plea, but insisted that a final decree, if then made, should recite that it was made by consent of the parties. When a phraseology as to the election of the said defendants to stand by their plea was finally fixed upon, the said Fields was then unwilling that the decree to be based thereon, should be more than a simple *pro confesso*, thus reserving the case for such interminable delays thereafter as the said Fields might be able to accomplish, toying of course
95 with the taking of testimony now and then touching the other parties whose names are added to this proceeding. The said defendants desired at that time, as they desire now, a speedy determination of the question whether this case is consistent with one already determined in this court between the same parties, and the said defendants are willing now, as they were then, to do everything in their power conducive to that end, but it seems they cannot, in that regard, have the co-operation of the complainant and the said Fields, even in so small a matter as the waiving of the time allowed for amendments. However, the course thus pursued by the complainant and the said Fields is doubtless consistent with their purpose in the bringing of this suit. If the ones who brought this suit did so in good faith and with an honest belief that the moneys now in the hands of the Treasurer, ready for payment, could be obtained for the complainant herein, and if they had desired to act in the suit with fairness to the court, why did they omit in the bill to make mention of William C. Gray, of Philadelphia, who is still knocking at the door of the Treasury and claiming the fund in question by a title that would be superior to the title set up by the complainant herein. The said Gray in April 1898 notified the Treasurer of the assignment he held from Robert M. Moore for the

moneys in question (the said assignment having been drawn by Charles Maurice Smith, of this city, and a copy of it enclosed to the Treasurer) and it was in December, 1898, more than eight months later, that Moore made another assignment of the identical moneys to the complainant herein, the latter assignment being the one upon which every claim put forth by the complainant herein is based. Counsel for the defendants Wagenhurst, Reyburn and Little, in the
96 statement which they had the honor to make in the Court of Appeals in equity cause No. 21698 in opposition to the motion by the complainant Wineland for leave to bring a new suit or to amend the one he then had, exhibited a properly certified transcript from the records of the Treasurer's office to show the correspondence with Gray; and they adverted also, in their opposing statement to that motion, to what would be shown in testimony, if such were taken (though Fields had twice declined to enter into the taking of testimony) concerning the pretensions to *bona fides* set up in the bill of complaint and the affidavits for leave to amend, to wit, that such pretensions were the veriest hypocrisy, amounting to a travesty on judicial procedure. A printed copy of the opposing statement so used in the Court of Appeals, as also of the motion to modify, made by Wineland, with the affidavits in support of that motion, is among the papers on file in this case.

However, the position assumed in these proceedings by the defendants Wagenhurst, Reyburn and Little is that the claims asserted by the complainant in this suit were adjudicated in this court in equity cause No. 21,698, and, occupying that position, they do not expect to abandon or vacate it until it shall have been examined by the count and pronounced untenable. They decline to be disconcerted or distracted by any "tom-tom" noises, or to permit an obscuration of the real question in the case, namely, whether the matters involved in this suit are not *res judicata* between the parties to this proceeding.

Simultaneously with the filing of this affidavit a copy is sent to the said Fields.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 16th day of February, A. D. 1903.

J. R. YOUNG, *Clerk*
By R. J. MEIGS, JR., *Ass't Clerk.*

97 *Motion to Expunge Parts of Affidavit of E. O. Wagenhurst.*

Filed March 2, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Comes here now the complainant, by his solicitor, and moves the court to expunge the following allegations from the affidavit of the respondent E. O. Wagenhurst, which was filed herein on February 16, 1903, for that such allegations are scandalous:

"In order that the dilatory tactics of the complainant may be more apparent by which he seeks to delay and avoid the true and meritorious question in this case," on page 2 of said affidavit:

"Thus reserving the case for such interminable delays thereafter as the said Fields might be able to accomplish, toying of course with the taking of testimony now and then," on page 2 thereof.

"However, the course thus pursued by the complainant and the said Fields is doubtless consistent with their purpose in the bringing of this suit. If the ones who brought this suit did so in good faith and with an honest belief that the moneys now in the hands of the Treasurer, ready for payment, could be obtained for the complainant herein, and if they had desired to act in the suit with fairness to the court," etc., on page 3 thereof.

98 "Such pretensions were the veriest hypocrisy, amounting to a travesty on judicial procedure," on page 4 thereof.

"They decline to be disconcerted or distracted by any 'tom-tom' noises, or to permit an obstruction of the real question in the case," on page 4 thereof.

THOMAS M. FIELDS,
Solicitor for Complainant.

The respondents Ellwood O. Wagenhurst, John E. Reyburn, and John K. Little, will take notice that the foregoing motion will be called to the attention of the court upon the hearing of the complainant's exceptions to their answer herein.

March 2, 1903.

THOMAS M. FIELDS,
Solicitor for Complainant.

To Messrs. J. A. Johnson, E. O. Wagenhurst, solicitors for above named respondents.

99 *Motion to Dismiss Bill.*

Filed March 11, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } In Equity. No. 23352.

Come now the defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, by their solicitors, and move the court to make an order forthwith dismissing the bill of complaint herein filed:

First. Because the matters and things concerning which a decree is prayed in the said bill are the identical matters and things concerning which, between the same parties, this court made a full, complete and final decree in a former suit, to wit, equity cause No. 21698.

Second. Because this suit was not brought in good faith or with any reasonable expectation of procuring for the complainant herein the funds described in the said bill, but for the sole purpose of securing delay in the payment of the said funds, now in the hands of the United States Treasurer, and in the hope that the true owners of the said funds would effect some sort of a compromise with the complainant rather than undergo the vexation, delay and expense of further litigation.

Third. Because the complainant should not be allowed to use this court as a means to delay and obstruct a settlement of a matter concerning which this court, to wit, in equity cause No. 21698, has declared that the complainant has no right, standing or interest whatever.

Fourth. Because the complainant should not be allowed in
100 this court to set up again, under the guise of a new and independent suit, a claim which he set up in a former suit against these same defendants, to wit, in equity cause No. 21698, which claim this court, in the said former suit, decreed to be without merit and thereupon dismissed the complainant, with his false clamor, from the precincts of the court.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for the Defendants Wagenhurst, Reyburn, and Little.

Take notice:—That when the above entitled cause is called for hearing on the exceptions to the answer of the defendants Wagenhurst, Reyburn and Little therein filed, the foregoing motion will be brought to the attention of the court, together with the accompany-

ing affidavit, and such other relevant matter as is already on the files of the court concerning the said cause.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for the Defendants Wagenhurst, Reyburn, and Little.

To Thomas M. Fields, solicitor for complainant Wineland.

101 *Affidavit of E. O. Wagenhurst.*

Filed March 11, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } In Equity. No. 23352.

DISTRICT OF COLUMBIA, *ss:*

Ellwood O. Wagenhurst, one of the defendants in the above entitled cause, on oath, says as follows:—

When the court in these proceedings refused to issue the preliminary restraining order desired by the complainant, the complainant's solicitor, Thomas M. Fields, repaired at once to the Treasury Department and exerted himself to have the payment by the Treasurer, of the moneys due, withheld pending the prosecution of this new suit. The matter of payment, with the request of the said Fields for delay therein, having been referred by the Treasurer to the Comptroller of the Treasury, a hearing was had by the latter official and at this hearing the said Fields made various representations to accomplish his purpose. Among other things, he re-iterated the charges made in the bill about the insolvency of the defendants herein, charges which had already been challenged in these proceedings and which would not have been made in the first instance except by a person utterly willful in his disregard of the truth, since the slightest inquiry about the defendants would have revealed that one of them was reputed among his friends a millionaire, and that another was a man whose financial standing and business integrity were beyond question, affording the highest guaranty that any money coming to his hands to which he was not justly entitled would be
102 promptly accounted for and turned over to the true owner.

When the defendants Wagenhurst, Reyburn and Little, in the hearing before the comptroller, urged that the claim put forth by the complainant Wineland was without merit, having been finally adjudicated in the cause already ended in this court, to wit, equity No. 21698, and that the present suit, equity No. 23352, was frivolous, vexatious and intended for delay only, the comptroller confessed that the matter appeared to him personally in that light,

but said he would assume that the court, if the matter were brought to its attention, could handle that phase of the case also, dealing summarily, if need be, with a party who would seek to abuse its process and procedure. The outcome of the hearing was that the comptroller advised the Treasurer that he (the Treasurer) would be justified in postponing payment to await the action of the court in the pending suit.

As soon as the said Fields had stayed payment at the Treasury Department, he proposed to the defendants Wagenhurst, Reyburn and Little, through one of their attorneys, that a compromise be effected, saying that he thought no reasonable proposition to that end would be rejected by the complainant, a small sum probably sufficing, especially as he expected eventually to realize in the suit at law No. 45489 on the indemnity bond which he took from Robert M. Moore. Hints were made at the same time by the said Fields as to the long delays that would probably occur before anybody could get the money if the litigation were continued and no compromise effected.

Thomas M. Fields, solicitor for the complainant, in motions herein
filed, has excepted to parts of certain affidavits I have made
103 in these proceedings as scandalous, and he asks the court to
strike out the so-called scandalous matter. If the facts set up by me and my fellow defendants and disclosed in our pleadings, my affidavits, and the papers on file in this court, are not true, then the court ought promptly to strike out the matter objected to as scandalous. If the facts thus set up are true, then the court ought summarily to close its door against the complainant in these proceedings.

ELLWOOD O. WAGENHURST.

Subscribed and sworn to before me this 11th day of March, A. D. 1903.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

104 *Motion to Expunge Part of Affidavit of E. O. Wagenhurst, &c.*

Filed March 16, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

Comes here now the complainant, by his solicitor, and moves the court to expunge from the affidavit of the respondent Ellwood O. Wagenhurst, filed herein on March 11, 1903, the matter following, for that the same is scandalous.

"And which would not have been made in the first instance except by a person utterly willful in his disregard of the truth."

THOMAS M. FIELDS,
Solicitor for Complainant.

The above motion will be presented to the court upon the hearing of the exceptions to the answer.

THOMAS M. FIELDS,
Solicitor for Complainant.

105 *Affidavit of Thomas M. Fields.*

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the complainant's solicitor in this cause; that he has read the affidavit of Ellwood O. Wagenhurst filed herein on March 11 1903; that he has been unable to find any record of any real property in this District in the names of the non-resident respondents John E. Reyburn and John K. Little, or either of them; that his information and belief is that neither of them has any such property here; that his information is that the said John E. Reyburn owns some household furniture in a residence here which he is said to occupy at times; that his information and belief are that the said John K. Little owns no personal property here; that he has no knowledge or belief that they or either of them own or owns either real or personal property out of this District; nor has he any such information upon which he can safely rely; that is not true that this suit was instituted or intended for delay only, but solely because the complainant and this affiant honestly believed and still so believe that the complainant is entitled as of right to the decree sought in this suit, notwithstanding the former decree in equity cause No. 21698, which right they expect to successfully maintain upon the final hearing of this cause; that while it is true that affiant has suggested to
106 Mr. Johnson, the solicitor of the said respondents, that a reasonable compromise of the matters in dispute should be made if possible, yet such suggestion was made in good faith, and was not in any manner based upon any idea that this suit was not filed in good faith, or was filed for any purpose of coercing the said respondents, or any one of them, into any compromise whatever; that it is true that unnecessary delays have occurred in this suit, but the record shows that in every instance they have been caused solely by the course of pleading herein which has been adopted by the said

respondents, to which the complainant has rightfully objected, and his objections have been sustained by the court so far as they have been heard and decided up to the present time.

Affiant further says that the motion to forthwith dismiss his bill herein, which motion the said respondents filed in this cause on March 11, 1903, is without reason or precedent in chancery practice, and beyond the power and jurisdiction of this court, and should be denied.

And further affiant saith not,

THOMAS M. FIELDS.

Subscribed and sworn to before me this twelfth day of March, 1903.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

107 *Certificate of Assessment.*

OFFICE OF THE ASSESSOR, DISTRICT OF COLUMBIA,
WASHINGTON, *March* 12, 1903.

This is to certify, that no real estate is assessed on the books of this office in the name of John K. Little or John E. Reyburn.

[Seal of Assessor's Office, D. C.]

H. H. DARNEILLE,
Assessor, D. C.
T. F. A.

108 *Order Sustaining Exceptions to Answer.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia, Sitting in Equity, March 19, 1903.

ELIAS WINELAND
vs.
E. O. WAGENHURST ET AL. } 23352, Eq. Doc. 52.

This cause came on to be heard at this term upon the exceptions of the complainant to the answer of the respondents Ellwood O. Wagenhurst, John E. Reyburn and John K. Little to the bill of complaint herein, and the said exceptions were argued by counsel for the respective parties, and considered by the court, and thereupon it is, this 19th day of March, 1903, ordered that the said exceptions be and they are hereby sustained with costs; and the said respondents shall put in a sufficient answer to the said bill within ten days from the date hereof, it being understood that, upon exceptions that may be filed to the new answer hereby required, the court will be at liberty to entertain argument on the part of the defend-

ants, except as to such exceptions as may be addressed to the want of observance of the requirements of the fifty-fourth equity rule.

A. B. HAGNER,
Asso. Justice.

109 *Waiver of Further Pleadings.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

And the said defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, not desiring to make other or further answer herein, but wishing to put the record in such shape that the court, as to them, may make at once a final order or decree in the premises, do declare their willingness to stand by the record as it now exists, thus relieving the complainant of proof touching any matter or thing set forth in the bill not sufficiently denied by the defense herein.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for the Above Named Defendants.

110 *Notice of Calling up Motions.*

Filed March 20, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Take notice:—That, on Tuesday next, March 24, 1903, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we shall bring again to the attention of the court the motion, herein filed on March 11, 1903, to dismiss the bill of complaint, the said motion, made by the defendants Wagenhurst, Reyburn and Little, not having yet been specially acted upon by the court.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for the Said Def'ts.

To Thomas M. Fields, Esq., solicitor for the complainant.
March 20, 1903.

Service of copy of above motion acknowledged this 20th day of March, 1903.

THOMAS M. FIELDS,
Solicitor for Complainant.

111 *Order pro Confesso Against Ellis H. Roberts.*

Filed Mar. 23, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

It appearing to the court that the defendant, Ellis H. Roberts, duly entered his appearance herein on June 10, 1902, but has not in any manner pleaded to the bill of complaint herein, it is this 23d day of March, 1903, ordered that the said bill of complaint and the allegations thereof, be and they are hereby taken for confessed as against the said defendant.

By the court:

A. B. HAGNER,
Asso. Justice.

Order Overruling Motion to Dismiss.

Filed Mar. 24, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Upon consideration of the motion herein filed on March 11, 1903, by the respondents Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, to dismiss forthwith the bill of complaint
112 herein, it is, this 24th day of March, 1903, ordered that the said motion be and it is hereby overruled with costs.

A. B. HAGNER,
Asso. Justice.

113 *Motion for Final Decree.*

Filed March 24, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Come now the defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, by their solicitors, and, showing to the court that their pleading herein has ended and that they have formally admitted on the record herein each and every of the allegations of the bill not sufficiently denied in the defense they have interposed (as shown by their statement filed herein on the 20th of March 1903), they move the court to make an order or decree in the premises which will end this cause and be a final determination thereof so far as the same concerns or affects the complainant and these defendants.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for the said Defendants.

Take notice: That on Monday, March 30, 1903, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, we will call the foregoing motion to the attention of the court and ask its action thereon.

To Thomas M. Fields, Esq., solicitor for complainant.

Service accepted.

THOMAS M. FIELDS,
Sol. for Complainant.

March 24, 1903.

114 (Endorsed:) This motion is overruled with costs. 31" March, 1903. A. B. Hagner, justice.

115 *Answer of R. M. Moore to Bill.*

Filed Apr. 2, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

The defendant, Robert M. Moore, hereby waives process and appears in this cause, and, in response to the bill of complaint herein and

the allegations thereof, says that he wholly disclaims any pecuniary interest in the retained moneys involved in this suit, but that the same belong exclusively and rightfully to the complainant, Elias Wineland; and this defendant hereby consents to any order or decree which the court may think proper to pass in this cause for the purpose of establishing the complainant's ownership to the said moneys and to enable the said complainant to collect and receive the same.

R. M. MOORE.

Note.—Oath waived.

THOMAS M. FIELDS,
Solicitor for Complainant..

116 *Pro Confesso Against Respondents Nos.* 1, 3, & 4.

Filed April 3, 1903. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
v.
E. O. WAGENHURST ET AL. } Equity. No. 23352.

It appearing to the court that the respondents Ellwood O. Wagenhurst, John E. Reyburn and John K. Little have not complied with the order passed herein on March 19, 1903, it is, this third day of April, 1903, ordered that the bill of complaint and the respective allegations thereof be and they hereby are taken for confessed as against them and each of them.

By the court,—

A. B. HAGNER,
Asso. Justice.

117 *Decree.*

Filed April 7, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

This cause duly came on to be heard at this term of the court upon the record and proceedings herein, and was submitted to and considered by the court; and it appearing to the court that an order was passed herein during the last term of this court, on March 23, 1903, taking the bill of complaint and the allegations thereof for confessed as against the defendant Ellis H. Roberts; and it further appearing to the court that another order was passed herein during the last term of this court, on April 3, 1903, taking the bill of complaint and the respective allegations thereof for confessed as against the respondents Ellwood O. Wagenhurst, John E. Reyburn and John

K. Little; and it further appearing to the court that the said orders *pro confesso* ever since have been and still are in full force and effect; and it still further appearing to the court that on April 2, 1903, the respondent Robert M. Moore duly waived process and appeared in this cause, and consented to any decree which the court may think proper to pass in this cause for the purpose of establishing the complainant's ownership of the retained moneys involved in this suit and to enable the complainant to collect and receive the same:

Thereupon it is, this seventh day of April, A. D. 1903, by
118 this court and the authority thereof, hereby adjudged, ordered and decreed as follows, after full consideration of the entire record and proceedings herein:

1. That the said orders *pro confesso* be and they hereby are confirmed and made absolute and final.

2. That the complainant Elias Wineland is now, and ever since December 21, A. D. 1898, has been, the sole and absolute owner in his own right, subject only to the conditions of retention, of the whole and all of the moneys, bonds and interest arising and retained under contracts Nos. 2361 and 2390 between the respondents Robert M. Moore and Elwood O. Wagenhurst, as co-partners trading under the firm name of R. M. Moore & Co., and the District of Columbia; which said retained moneys, bonds and interest are now, and before December 21, A. D. 1898, were, and ever since have been, in the hands of the defendant Ellis H. Roberts, Treasurer of the United States of America, and *ex-officio* commissioner of the sinking fund of the District of Columbia, and which are fully described in the bill of complaint and exhibits herein; and the sole and absolute ownership of the complainant in his own right, subject only to the conditions of retention, of the whole and all of the said retained moneys, bonds and interest, is hereby decreed, declared and confirmed.

3. That the respondents Elwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore have not any valid right, title, interest, estate, claim, or demand whatever in or to the said retained moneys, bonds and interest, or any part thereof, as against the complainant.

4. That the respondents Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore, be and they hereby are perpetually enjoined and restrained from interfering or inter-
119 meddling in any manner whatsoever with the said retained moneys, bonds and interest, or any part thereof; and likewise from collecting or receiving the same, or any part thereof.

5. That the complainant recover against the respondents Ellwood O. Wagenhurst, John E. Reyburn, John K. Little and Robert M. Moore the costs of this suit, to be taxed by the clerk of this court, for which costs the complainant shall have execution as provided by law.

6. That the clerk of this court transmit a duly certified copy of this decree to the said Ellis H. Roberts.

By the court:

A. B. HAGNER,
Associate Justice.

120 *Order Allowing Appeal and Fixing Penalty of Bond.*

Filed Apr. 8, 1903.

O. K. T. M. F.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND
vs.
ELLWOOD O. WAGENHURST ET AL. } Equity. No. 23352.

Come now the defendants, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, and, in open court, pray an appeal to the Court of Appeals of the District of Columbia from the decree of this court herein made on yesterday, April 7, 1903.

Whereupon, it is, by the court, this 8th day of April, A. D. 1903, ordered that the said appeal be allowed and that the appeal bond to cover costs in the said appeal be, and the same hereby is, fixed at $100.00 *dollars.*

A. B. HAGNER,
Asso. Justice.

Memorandum.

April 13, 1903.—Appeal bond filed.

121 *Order for Transcript.*

Filed Apr. 10, 1903.

In the Supreme Court of the District of Columbia.

ELIAS WINELAND, Complainant,
vs.
ELLWOOD O. WAGENHURST ET AL., Defendants. } Equity. No. 23352.

The clerk of the court will make a transcript of the record in this cause for the Court of Appeals of the District of Columbia, to which an appeal has been taken, and he will put into the transcript the following matter, namely :—

1. The original bill, exhibits and accompanying affidavits.
2. The rule upon defendants Wagenhurst, Reyburn and Little to show cause why they should not be enjoined *pendente lite* and a receiver appointed.
3. The response to said rule and accompanying affidavits.
4. The order discharging said rule.
5. The plea of defendants Wagenhurst, Reyburn and Little.
6. The motion by said defendants, filed August 12, 1902, to dismiss the bill of complaint.

7. The motion by complainant, filed August 13, 1902, for a *pro confesso* against the said defendants.

8. The order of the court on said motions.

9. The amendments of Wagenhurst, Reyburn and Little to the affidavits accompanying their plea, and the amended certificate of counsel.

122 10. The motion by complainant, filed August 20, 1902, for a *pro confesso* against defendants Wagenhurst, Reyburn and Little.

11. The order of the court overruling said motion.

12. The precipe by complainant to calendar cause for hearing on the plea.

13. The order of the court overruling the plea.

14. The answer of defendants Wagenhurst, Reyburn, and Little and the exhibit thereto.

15. The exceptions to the answer, and accompanying affidavit.

16. The affidavit of Wagenhurst, filed February 5, 1903.

17. The motion by complainant, filed February 11, 1903, to expunge, and accompanying affidavit.

18. The affidavit by Wagenhurst, filed February 16, 1903.

19. The motion by complainant, filed March 2, 1903, to expunge.

20. The motion by defendants Wagenhurst, Reyburn and Little, with accompanying affidavits, to dismiss forthwith the bill of complaint.

21. The motion by complainant, filed March 16th, 1903, to expunge with accompanying affidavit.

22. The order of the court sustaining exceptions to the answer.

23. The waiver of further pleading by defendants Wagenhurst, Reyburn and Little.

24. The notice that action would be asked of the court on the motion to dismiss forthwith the bill of complaint.

25. The *pro confesso* against defendant Roberts.

26. The order overruling the motion that the court dismiss forthwith the bill of complaint.

123 27. The motion by defendants Wagenhurst, Reyburn and Little, filed March 24, 1903, for a final decree, and the action of the court on said motion.

28. The appearance and answer of defendant Moore.

29. The *pro confesso* against defendants Wagenhurst, Reyburn and Little.

30. The final decree.

31. The order allowing the appeal—

The same being everything of record in the case—except the printed matter filed in connection with the plea in the case, said printed matter consisting of

(1.) A copy of the record in equity cause No. 21,698 in the Court of Appeals;

(2.) A copy of the motion made and filed in the Court of Appeals by the complainant Wineland for a modification of the decree of that court;

(3.) A copy of the briefs used in that court by the parties adversary to said Wineland, as also

(4.) A copy of their statement in the said court in opposition to Wineland's motion for a modification of the decree of the court.

And except also the following matter, which, like the above mentioned printed matter, may be omitted from the transcript, namely:—

(*a.*) The subpœna writs.

(*b.*) The petition by defendants Wagenhurst, Reyburn and Little (and the action of the court thereon) for a stay of proceedings in this cause until the payment of the costs in equity cause No. 21,698.

(*c.*) The motion by defendants Wagenhurst, Reyburn and
124 Little that the complainant give security for costs in this cause, all papers pertaining to the said motion, and the action of the court thereon.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
Solicitors for Appellants.

125 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 124, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No 23,352, in equity, wherein Elias Wineland is complainant, and Ellwood O. Wagenhurst, *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 27th day of April, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1310. Ellwood O. Wagenhurst *et al.*, appellants, *vs.* Elias Wineland. Court of Appeals, District of Columbia. Filed Apr. 27, 1903. Robert Willett, clerk.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1903.

No. 1310.

ELLWOOD O. WAGENHURST *et al.*

vs.

ELIAS WINELAND.

BRIEF IN BEHALF OF APPELLANTS.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
For the Appellants.

Sheiry, Printer, 413-415 Ninth Street.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1903.

No. 1310.

ELLWOOD O. WAGENHURST *et al.*

vs.

ELIAS WINELAND.

BRIEF IN BEHALF OF APPELLANTS.

This case is an appeal from a decree of the Supreme Court of the District of Columbia made on April 7, 1903, adjudging Elias Wineland to be the owner, as against these appellants, of certain moneys now in the hands of the United States Treasurer, who is ex officio commissioner of the sinking fund of the District of Columbia, the said moneys being the ten per cent. retentions under a couple of sewer contracts made between Robert M. Moore and Ellwood O. Wagenhurst, under the firm name of R. M. Moore & Co., and the District of Columbia. Counsel for the appellants have already, in a brief in opposition to the motion herein filed to dismiss or affirm this appeal, explained the character of the proceedings had in this cause prior to the decree of April 7, 1903, from which

this appeal is prosecuted, and they beg now to refer to that brief as containing a statement or narration showing how the points involved in this case arise.

As pointed out in that brief, the decree from which this appeal is prosecuted is identical, in the relief granted, with a decree of November 15, 1901, of the same court, made in a suit that was brought by the appellee (Elias Wineland) against these appellants, and that decree, brought by these appellants to this court, was reversed and the bill of complaint on which founded ordered to be dismissed and this court refused to permit the dismissal to be without prejudice. On the filing of the present suit these appellants made defense by a plea setting up the former adjudication. When that plea was overruled, these appellants did not abandon their plea but saved all benefit thereof. They say (as appears on page 47 of the printed record where they put in their answer), "Not waiving or relinquishing the plea by them herein made, but saving and reserving to themselves and each of them all the benefit and advantage of the said plea," etc. When the answer they had put in was held insufficient, they elected "to stand by the record as it now exists," the record disclosing both their plea and their answer; and upon that election they moved the court for a final decree in the premises. Their motion for a final decree involved of course a consideration of the merits of their defense, "defense" being a generic term embracing both plea and answer. They had admitted the matters and things set forth in the bill only so far as they were not sufficiently denied by their defense. The lower court, in the face of such a record, on April 3, 1903, entered against these appellants a *pro confesso* (page 70 of the printed record). And that *pro confesso* was the basis on which the lower court, without further act of any kind on the part of these appellants, or notice of any kind to them, entered, on the first day of the following term, to wit, on April 7, 1903, the final decree from which this appeal is prosecuted.

Assignment of Errors.

The court below erred as follows:

First. In overruling the plea put in by these appellants to the bill of complaint. The reason for such overruling, as given orally by the Justice who made the order, was that the plea did not have a supporting answer.

Second. In declaring the answer put in by these appellants to the bill of complaint to be insufficient. For making such an order in reference to the answer, the reason, as given orally by the Justice who made the order, was that the answer was not divided into paragraphs with a numbering responsive to the paragraphs of the bill.

Third. In overruling the motion made by these appellants, based on the records of the court below, including its records in Equity cause No. 21698, to dismiss the bill of complaint in this cause, Equity No. 23352.

Fourth. In entering a *pro confesso* against these appellants when the record contained both their plea and their answer, and they in no wise in default.

Fifth. In entering a decree adjudging Elias Wineland to be the owner of the funds described in the bill of complaint when a decree by the same court and the same justice, made not seven months before under the direction of this court, adjudged Wineland to be without right in the premises.

As to the first assignment of error:—The bill in this case did not disclose the fact of a former adjudication. If it had, and had not stated facts to impeach the same or to avoid the operation of the decree, as by alleging that it had been obtained by fraud, the bill would have been demurable. Not disclosing the former adjudication, it was proper to interpose that adjudication by plea; and, there being nothing averred in the bill calculated, in even the slightest degree, to overcome the former adjudication, a supporting answer to the plea was not required. No rule in equity pleading is better established.

In order to understand fully the office of an answer in sup-

port of a plea it is only necessary to recur for a moment to the peculiar character of the pleadings and proceedings in a suit in equity. A bill in equity is (1) a pleading for the purpose of bringing before the court and putting in issue the material allegations and charges upon which plaintiff's right to relief depends; and the bill is (2) an examination of the defendant upon oath for the purpose of obtaining evidence to establish the plaintiff's case, or to disprove the defense which may be set up by the defendant. And the answer of defendant embraces two things which are essentially distinct from each other, namely, (1) the defense of the defendant to the case made for relief by the bill against him; and (2) the examination of the defendant, consisting of the discovery sought by the bill, to prove the plaintiff's case, and to disprove the defense of the defendant. It is in the latter sense only that a plea is required to be supported by an answer. The office of such an answer—a supporting answer to a plea—is, not to defend the action, but to furnish the plaintiff evidence to try the truth and validity of the plea. The whole office and function of such an answer is discovery, not defense. If the plaintiff in his bill should state a variety of matters which, if admitted to be true, would be evidence to counterprove the allegations of the plea, it would be necessary not only to negative such matters by general averments in the plea, but also to support the plea by an answer as to such matters; for, upon the trial of the issue raised by a plea, the burden is upon the plaintiff to prove his case; and, in so far as it is not admitted by the plea, he is entitled, under the cardinal principles of equity pleading, to a discovery from the defendant to prove his case, or aid in the proof thereof. And the fact that the defendant defends by plea instead of by answer does not deprive the plaintiff of his right to discovery. Where the defense is by plea, the plaintiff is entitled to all the discovery that may be necessary to try the truth and validity of the plea, and this right, so far as the matter of the plea is concerned, is just as extensive when the defense is made by

plea as when it is made by answer. Upon the argument of a plea, every fact stated in the bill and not sufficiently denied by the averments in the plea (and also by the supporting answer when such answer is necessary) must be taken as true.

The error into which the court below fell in passing on the plea in this case was the idea that every plea which set up a bar to the bill should be accompanied by a supporting answer; whereas in the case of a plea, based upon the records of the court, setting up a former adjudication which the bill has not sought in any way to challenge or impeach, there is no occasion for a supporting answer; the only evidence necessary or proper in such a case is the record itself, of which the court takes judicial notice.

The whole purpose and function of a supporting answer to a plea being to afford a discovery from the defendant of what the plaintiff is entitled to know under the averments of his bill, there was nothing for Wagenhurst, Reyburn and Little to do when interposing their plea in this case but to point to the record of the former adjudication. Where the plea is *res judicata*, the question is, not whether such a decree has been made, but whether, such a decree having been made, it ought to operate to bar the plaintiff's demand. To avoid its operation the bill must have impugned it in some way, as by alleging fraud in the obtaining of it; and, in such case, to sustain the plea as a bar, the fact of fraud must be denied and put in issue by the plea, and of course by the supporting answer which, under such circumstances, must accompany the plea.

Upon the question whether a decree ought to operate as a bar the fact of fraud is the only point upon which issue can be joined between the parties. If the bill states the decree as a pretense of the defendant, which it avoids by stating that if any such decree had been made it had been obtained by fraud, the decree must be pleaded, because the fact of the decree in such case is not admitted by the bill; and the charge of fraud must also be denied by the plea for the reasons already stated.

If the bill states the decree absolutely, but charges fraud to impeach it, the decree must yet be pleaded, because the decree, if not avoidable, is alone a bar to the suit; and the fraud by which the bar is sought to be avoided must be met by negative averments in the plea, because without such averments the plea would admit the decree to have been obtained by fraud, and would therefore admit that it formed no bar. When issue is joined on such a plea, if the decree is admitted by the bill, the only subject upon which evidence can be given is the fact of fraud. If that should be proved, it would open the decree on the hearing of the cause and the defendant would then be put to answer generally, and to make defense to the bill as if no such decree had ever been made. The object of the plea is to prevent the necessity of entering into defense by trying first the validity of the decree. If the evidence of fraud should fail, the decree, operating as a bar, would determine the suit as far as the operation of the decree extended.

What has been said above on the office and function of a plea in equity and a supporting answer, while not enclosed in quotation marks, is taken almost without the change of a word from the recent work of Mr. Bates on "Federal Equity Procedure," Secs. 232 and 233, Vol. 1, pp. 304–307. The same matter is found almost verbatim in Mitford's Chancery Pleadings, star pp. 239–243. Indeed, every text writer on the subject has for years spoken in the same way and to the same effect, and the principles thus announced are "hornbook" law to the practitioner in equity, though lost sight of for the moment by the court below when making the decree in the present case.

If the court will pardon a further reference to elementary law, to which it is sometimes helpful to recur, the text writers divide pleas in bar into three kinds, namely: (1) those based upon a statute, as the statute of limitations, or the statute of frauds; (2) those based upon matter of record, or as of record; and (3) those based upon matters *in pais*, the latter including such

as release, account stated, award, accord and satisfaction, purchase for valuable consideration without notice of the plaintiff's title. Mention is thus made of the various kinds of pleas in bar that we may have them before us when we look at the rules which say how a matter in bar, falling under one or another of the above heads, shall be pleaded and proved in court. For instance, as to the necessity of a plea being put in on oath (the rule being that the oath is necessary) we read as follows in 1 Daniels Chancery Pleading and Practice, 6 Am. Edition, star p. 686. "If the matter pleaded is purely matter of record, or, in other words, matter which may be proved by the record, the oath of the party is not necessary; but, if any fact *in pais* is introduced which would require to be proved at the hearing, the plea must be upon oath. Thus, a plea of the statute of limitation, or of any other statute which requires averments to bring the conditions of the case within its operation, must be upon oath. It seems, however, that a mere averment of identity will not render it necessary that a plea of record should be put in upon oath; therefore, where a plea of the plaintiff's conviction for forgery was put in without oath, Lord Eldon held it sufficient, although there was an averment of the identity of the plaintiff; and so the circumstances of a plea of outlawry, containing such an averment, will not render it necessary that it should be upon oath. To entitle a defendant to plead any matter without oath, because it is a matter of record, it must have been properly enrolled or made a complete record in the court out of which it comes." * * Star p. 687: "When, therefore, it is said that pleas of matters of record may be put in without oath it must be understood as confined to those matters which are of record, strictly so speaking, and which require no other evidence to prove them than what the courts are in the habit of recognizing upon inspection. * * Upon this principle it is, that a decree of dismissal, signed and enrolled, may be pleaded without oath. Upon the same principle, a plea of outlawry, or of excommunication, may be put

in without oath; and so may a plea of conviction of felony.

"Matters not so recorded may be capable of proof *aliunde;* but, if pleaded, the plea must be accompanied by the oath of the party; unless, indeed, they consist of transactions in the court itself, which, although they have not been solemnly and formally enrolled, are quasi of record. Pleas of such matters, as well as matters of record, may be put in without oath; for, as the court is in the habit of noticing its own proceedings, they are capable of proof without any other evidence than the proceeding itself. * * * Upon this principle it is, that, when a plea of a suit already depending in the court of chancery is put in, the court does not require that it should be upon oath, but ordinarily directs an inquiry into the existence of such a suit." * * *

In Adams' Equity, star page 341, we read: "It is necessary to the validity of a plea that it be verified by the defendant's oath. This rule is in accordance with the general principle of equity that no man shall set up a defense which he does not believe to be true. The exceptions to it are where the matter pleaded is provable, not by evidence of witnesses, but by matter of record, *i. e.*, by the enrolled proceedings of a court of record. In this case the the mere inspection of the record is conclusive, and no oath is required."

Despite such as the foregoing about the non-necessity of an oath when the plea is based upon a record of the particular court in which made (and all the text writers, English and American, speak to the same effect), it was objected in the lower court that the plea of these appellants was vitally defective because the oath appended to it had omitted to say that the plea "was not interposed for delay." That objection was urged in connection with the motion for a *pro confesso*, made in August, 1902, (p. 41, Rec.), when these appellants had moved (ditto) for a dismissal of the bill on the ground that their plea had been neither replied to nor set down for argument. When these motions

came on for hearing before the Justice then holding the summer session of the court for interlocutory business, he stated, as to the motion to dismiss, that he doubted the propriety, at that time, of making a final decree in any cause, as he would be doing if he should grant that motion; and, as to the motion for a *pro confesso*, he said that if he thought the objection as to the oath well taken (as to which he said he would express no opinion) he would certainly give leave to amend. In that state of the case, seeing that they must at any rate wait for a later sitting of the court to get a final order, these appellants, through their counsel, suggested that both motions be overruled, the one by them to be with leave to amend the affidavit to their plea, and the court so ordered (page 42, of the printed record). Despite the broad and liberal terms of the statute, which authorizes the allowance of amendments of every kind (sec. 399 of the Code, as amended by act of June 30, 1902), the motion for a *pro confesso* was renewed after the amendment had been made (p. 44, Rec.), on the ground that such a matter was not capable of amendment. When this motion came on for hearing, the Justice who heard it (the same who had heard the former motion for a *pro confesso*, and who has since become Chief Justice of the court in which he was then presiding) expressed himself with considerable warmth, as though the judicial conscience had been touched by asking that such an order be made in the face of a pleading, whether defective or not, which had directed the court to its own records as containing a sufficient response to the bill of complaint. This motion for a *pro confesso*, like its predecessor, was overruled, (p. 45, of the printed record). This action on the part of one Justice, who had twice refused to grant a *pro confesso* in the face of the plea, was followed by action on the part of another, who overruled the plea, and who later, though an answer in the meantime had set up the same bar as the plea, granted a *pro confesso* in the face of both the plea and the answer. This

is the *pro confesso* to which reference is had in the 4th assignment of error. The 3d assignment of error refers, not to the overruling of the motion to dismiss, made, as above mentioned, in August, 1902, for the reason that the complainant had at that time neither replied to the plea nor set it down for argument, but to the overruling on March 24, 1903, (p. 68, Rec.) of the motion to dismiss made on March 11, 1903, (p. 62, Record).

In regard to the answer put in by these appellants, it is proper to premise that the well-known rule of chancery pleading that, if a defendant submits to answer he shall answer fully to all matters of the bill, is abrogated by rule 39 of the Equity rules prescribed by the Supreme Court of the United States. The provisions of that rule constitute rule 34 of the Equity rules of the Supreme court of the District of Columbia. That rule, applying to cases where the defendant by plea might protect himself from a full answer and discovery, provides that the matter of such plea, as a bar to the merits of the bill, may be set forth in an answer, without answering further, or making discovery beyond what would be necessary if the defendant had used a plea instead of an answer. That rule was fully considered and explained by Justice Bradley, of the court which made it, in Gaines *v.* Agnelly, 1 Wood, 238. In that case prescription had been set up in the answer as a bar which entitled the defendants to the benefit of the rule above mentioned. The matter came before Justice Bradley at circuit on exceptions to the answer. He said (p. 240):

"Under the old practice, if a plea in bar were filed and issue taken upon it, and that issue were decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matter were set up in an answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. The new rule, which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves

the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer. But this disadvantage is compensated for, in some degree, by the liability of the defendant to be called as a witness. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exception, when the answer sets up a bar to the whole bill, and claims the benefit of it as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer, or file a replication and proceed to proofs, according to the exigency of the case.

"From this view of the subject, it is manifest that, if the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them, and the rule no longer applies, that, if the defendant does answer at all, even on matters outside of the bar, he must answer fully. If that rule did apply, it would have the effect of converting the answer, in such a case, into a strict plea in bar. Any divergence of statement, any notice of the allegations of the bill outside of the strict line of defence, would be held a waiver of the bar, and would subject the defendant to the old burden of a full answer. I do not think that this would be a sound construction of the rule.

"The defendants show title sufficient to lay the foundation of a prescription; and on that defense they stand. It seems to me that they are not called upon to answer further. The bar set up is *prima facie* a good defense, and the exceptions must be overruled."

In Sample *v.* the Bank, 1 Wood, 523, a bar was set up in an answer, instead of by plea, and the court speaks as follows (p. 529):

"To that part of the bill which alleges an assignment of the assets of the bank, and calls upon the assignee to account for the trust funds, the defendants set up in their answer the decree of the superior court of Richmond County, which is also mentioned in the bill, distributing the funds of the bank and discharging the assignee.

"There are no sufficient averments of fraud or collusion in the bill to render the decree void. * The setting up of the decree in the answer excuses the defendant from further answer to that part of the bill to which the averments relative to the decree apply.

"The answer appears to us to be a complete defense to the case made by the bill. * The exceptions must, therefore, be overruled."

In Hatch *v.* Bancroft-Thompson Co.,——Fed. Rep.,—— we have like expressions concerning an answer in equity which sets up matter that might have been used as a plea in bar, the court, among other things, saying: "Rule 39 is considered by the late Justice Bradley in Gaines *v.* Agnelly, 1 Wood, 238. The learned justice there says that the general effect of the rule is to leave the complainant under the burden of proving his bill and takes from him the benefit of defendant's answer."

The Supreme Court of the United States, in Hovey *vs.* Elliott, 167 U. S., 409, makes a most elaborate discussion of the power of an equity court to strike out the answer of a party said to be in contempt and thereupon proceeding to a decree *pro confesso*, and concludes that no such power exists. The court says (p. 446), in words that will touch the case at bar: "There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."

In the case at bar the court below, in the words just quoted, "*refused to consider the merits of a sufficient defense,*" and proceeded to decree a *pro confesso* without even first entering an order to strike from its files the answer and the plea, both of which had remained on its files. Indeed, if the court below had made its decree at the time it was asked to do so, to wit, at the time these appellants, standing upon the record, moved for a final decree, there would have been no *pro confesso* phraseology in the case, and it would certainly have been as competent for the court at that time (March 31, 1903, p. 69, Rec.) to make the decree it did make, as to make it on the 7th day of April, 1903, and call it a *pro confesso.*

The plea interposed in the case at bar was a pure plea in reply to a bill which stated no matter that would in any wise offset or affect the former decree. Nothing was alleged in the bill which, if true, would, in the slightest degree, have raised any question touching the plea but the mere question of *res judicata* as to the whole matter of the bill. No ground for discovery, denial or reply, by way of answer in support of the plea, was at all raised by any averment of the bill. The averments of fraud made in the new bill were precisely the same as those made in the former bill, and made in precisely the same terms. The matter in the former bill had been passed upon by the decree rendered thereon. Fraud was a distinct fact or matter in issue in that cause and the decree of the court became, in law, the highest evidence touching the fraud so alleged, conclusively estopping further averment of the same fraud, just as every other averment, material to the complainant's title, was passed upon in that cause and the complainant estopped with reference thereto. As said in Greene *v.* Greene, 2 Gray, 361, 366: "The maxim that fraud vitiates every proceeding, must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is

not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted." The same doctrine is contained in the following words from the opinion of the Court in Root *v.* Woolworth, 150 U. S., 401, 414: "The appellant could not by a direct proceeding have impeached the former decree for this alleged fraud, because, even if it were sufficient to invalidate that decree, he shows no reason why it was not interposed or set up in the former suit." Indeed, there would be no reason or principle in the proposition that merely because a complainant has the hardihood to reiterate and re-aver allegations of fraud in a second bill (the fraud complained of having already been considered in a previous bill), a defendant is thereby forced to meet the issue a second time, by answer and discovery. Is it not a sufficient denial of such second averment to say, "This matter has been decided, and the court has found no fraud to exist?" Can a complainant, in other words, put a defendant to answer and discovery on a particular issue of fraud as often as he desires? If he can do so twice, why not three times, and why not indefinitely? Can it be that there is such particular legal grace in the mere cry of fraud, however ridiculous it may be in the circumstances under which made and however remote from the truth, that the one who makes the cry, barefaced though he be in his pretense, can enforce the issue and assert it over and over again as often as it pleases him to file a bill in equity? Is he at liberty to continue such business as long as he can find an attorney whose code of professional ethics will permit him to draw a bill for the purpose? What is a decree of the court worth, if the party who obtains it can still be forced to remain in court indefinitely, his property tied up by litigation, as in this case; interest increasing on his debt, which the property in litigation, as in this case, was intended to pay; costs, on one side or the other, and attorneys' fees on both sides, piling up year after year? Surely no rule of court was ever intend-

ed to operate in such a manner! If it was, then it is an improper rule, subversive of common right and common sense, and should be amended to be more consistent with the ends to be accomplished in a court of justice.

However, we are not here fighting rules of the court. We have no charge to prefer against any rule of the court below, but only against an interpretation of the rules, which, adhering to the bare letter of the rule, sticks in the bark and loses sight of the purpose and spirit of the rule. For instance, a rule below says (Eq. 54 : "The answer, after the introductory part of it, shall be divided into paragraphs in the same manner as the bill, and each paragraph in the answer shall correspond with the paragraph in the bill of the same number"—a good enough rule and answering a good purpose; but, if the defendant has for defense a single matter (as, for instance, a former adjudication or the statute of limitations) which constitutes, as he thinks, a good bar to the whole and every part of the bill, what need he do more than set up his bar against the whole and every part of the bill? If his pleading points out with distinctness the part of the bill to which it is responsive, whether it be to one paragraph only or to forty paragraphs grouped as a whole, the reason and purpose of the rule is gratified; for another rule of the same court (Eq. 34) says: "The defendant may in all cases insist by answer upon all matters of defense in bar of or to the merits of the bill, of which he may avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than such as he would be compellable to answer and discover upon filing a plea in bar and answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense." In answering under this rule (Eq. 34), a defendant is no more required to make a marginal numbering of paragraphs for his answer than he is required to make such a numbering for a plea. In neither case would such a numbering be either possible or intelligible, for the pleading (whether it

be a plea, or an answer insisting upon the same matter) points out on its face the part of the bill to which it is responsive. In such a pleading, the defendant is not separately responding, seriatim and by number, to the allegations of the several paragraphs of the bill, but he is interposing a defense to "each and every of the allegations" contained in that part of the bill to which his bar applies. How meaningless, not to say confusing, it would be to attach figures to the margin of such a pleading as though it consisted of separate and distinct parts and were not to be taken as a complete whole interposed to a designated part of the bill.

There is no way to avoid the simple proposition that there is nothing in the complainant's bill to affect in any way the defense made first by the plea and afterwards by the answer. As long as the decree in the prior suit remains unreversed and unimpeached, the title of the appellants to the property in controversy is fixed and settled, so far as Elias Wineland is concerned. That decree is the law of the case. Whether right or wrong, it stands as the decree of the court on the subject-matter of this controversy. It is the highest evidence of the facts, issues and title raised by the controversy. The complainant, Wineland, is completely estopped from denying the facts decided by that decree so long as the decree stands unimpeached and uncontroverted. As said by Justice Story in Young *v.* Black, 7 Cranch, 567: "The controversy has passed *in rem judicatam.* The identity of the causes of action being once established, the law will not suffer them again to be drawn in question."

In the case at bar the parties are the identical persons who were parties to the former suit brought by Wineland, except that Wineland in his present suit has added as a party defendant Robert M. Moore, the person from whom he claims to derive a title to the funds in controversy. He derived his title in the same way and by the same instrument in his former suit, though he did not make Moore a party to that suit. In

the present case he sues in the same capacity in which he sued in the former case, and the defendants Wagenhurst, Reyburn and Little, as also the Treasurer of the United States, are sued in the same capacities in which they were sued in the former case; and the relief prayed in the present case is identical with that which was prayed in the former case. The subject-matter claimed by Wineland in the present case is identical with that claimed by him in the former case, to wit, the funds now in the hands of the United States Treasurer, retained under contract No. 2361 and contract No. 2390, made October 20, 1896, and May 19, 1897, respectively, between Ellwood O. Wagenhurst and Robert M. Moore, as co-partners under the firm name of "R. M. Moore & Co.," and the District of Columbia, the said contracts being for the laying by Wagenhurst and Moore of certain sewers in the District of Columbia.

The rule is uniform and universal in our system of jurisprudence that the outcome of a suit decided on its merits by a court with jurisdiction of the parties and the subject-matter, whether it be a court of law or of equity, conclusively, in another action, binds the parties and their privies, not only as to every matter and thing which was actually offered and received to sustain or defeat the claim or demand in the first suit, but also as to every other admissible matter or thing which might have been so offered in the first suit. For instance, in Cromwell *v.* County of Sac, 94 U. S., 351, Justice Field, speaking for the Court, said (p. 352): "In the former case (that of a judgment between the same parties on the same claim or demand), the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Again (p. 353): "The language, therefore, which is so often used,

that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

In the same case, Justice Clifford, dissenting on another point, stated the rule on this point as follows (p. 364): "Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue, the rule in such a case being that every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and that the whole defense might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties.

"Except in special cases, the plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the issue, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Again, on page 365, Justice Clifford says: "Since the resolution in Ferrer's Case, 6 Coke, 7, the general principle has always been conceded, that, when one is barred in any action, real or personal, by judgment or demurrer, confession or verdict; he is barred as to that or a similar action of the like nature for the same thing forever. Demurrer for want of equity in such a case is allowed in chancery, because the whole matter in controvery is open in the first suit.

"Contrary to that rule, a party brought a second bill of

complaint, and the Vice-Chancellor, in disposing of the case, expressed himself as follows:

"'Where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the party has, from negligence, omitted part of his case.'

"And he added that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

"When a fact has once been determined in the course of a judicial proceeding, say the Supreme Court of Massachusetts, and final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done; and they proceed to say that the estoppel is not confined to the judgment, but extends to all the facts involved in it, as necessary steps or the ground-work upon which it must have been founded." (The various citations of authority made by Justice Clifford in the course of the above extracts are here omitted.)

Again in Southern Pacific Railroad Co. *v.* The United States, 168 U. S., 1, Justice Harlan, speaking for the court, says (p. 48): "The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit

between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (The authorities cited in the opinion of the court are here omitted.)

Again, in Beloit *v.* Morgan, 7 Wall., 619, which was a bill in equity to enjoin proceedings at law on certain bonds, other bonds of the same issue having already gone to judgment in a former contest between the same parties, Justice Swayne, speaking for the Court, says (p. 621):

"The parties were identical, and the title involved was the same. All the objections taken in this case (the pending suit at law, which it was sought to enjoin) might have been taken in that (the former suit at law). The judgment of the court could have been invoked upon each of them, and, if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different. * Such has been the rule of the common law from an early period of its history down to the present time. But the principle reaches further. It extends not only to the

questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented." (The authorities cited in the opinion of the court are here omitted.)

In one of the first cases decided in this court (Gray *v.* District of Columbia, 1 D. C. App., 20), a case in which the plaintiff was seeking to recover interest upon a claim which he had established in the Court of Claims against the District of Columbia, this court, speaking by Mr. Justice Shepard, says (p. 26):

"Under a familiar principle of law the judgment of that tribunal (the Court of Claims) is conclusive of all points which were, or ought to have been, determined therein, and no other court can go behind it to administer relief not provided for thereby."

See also, as to the character and effect of decrees final in terms, the following cases:

State *v.* Brown, 64 Md., 199.
Martin *v.* Evans, 85 Md., 8.
State *v.* Ramsburg, 43 Md., 33.

And likewise:

Bates on Federal Eq. Procedure, Sec. 278-280, Vol. 1, pp. 338-341.

Herman on Estoppel and Res Judicata, Sec. 99, 105, 108, 113-116, 119, 121, 122, 125.

These defendants, in the case at bar, declined to join in or to raise immaterial issues. They did not desire the litigation prolonged, for a prolongation of it could only be to their disadvantage. The complainant had succeeded in tying up the funds in dispute and preventing payment at the Treasury Department, and these defendants had no execution against the Treasurer. So long as the Treasurer should decide, in view of continued litigation, to hold the money, the defendants would be helpless, no matter on what pretext the litigation

were protracted. With a decree of the Court of Appeals point-blank against him (a decree adjudging him to have received nothing from the one member of the firm who had nothing left in himself to grant after the disposition of all the firm assets by both partners; with that decree reviewed by the Court of Appeals on the motion to modify, wherein were offered additional averments to sustain and establish his equitable title, and the motion to modify, elaborately supported on oath and argued at length with citation of many authorities, refused in every particular), the complainant could not, it is earnestly submitted, in any reasonable view of the case, hope to prevail in further litigation of the subject, unless, in some fortuitous manner, he could involve the case in technicalities. The defendants, desiring a speedy determination of the new case on its merits, began at once to strain every nerve to get to a final determination of a suit which, as they believed, had been filed without reasonable ground, without hope in the complainant's counsel of ever actually securing any of the money in controversy, but with the sole purpose of continuing litigation in the hope that some result would be attained more favorable for the complainant than that fixed by the decree of the Court of Appeals in the matter.

It is hard to know on what ground the complainant can expect to avoid the decree in his former suit. The only light as yet vouchsafed in these proceedings on that point is that counsel for the complainant, on several occasions in the lower court, vaguely suggested that the decree in his former case had not been made "on the merits" of the case.

What could the former decree have been but a decree on the merits? The complainant raised no objection to the decree in the former suit which was brought to this court. His own counsel drew that decree in terms as broad and comprehensive as he could devise. There was no doubt in the mind of counsel for the complainant at that time but that the case was for decision on its merits and that the decree which

he had drawn embodied the merits. The appeal to this court was from that decree. What could this court do but decide on the merits? The whole record, including the decree, was before it. Certainly in the court below the matter had been heard often enough. Two decrees had been made on full hearing, the one diametrically opposed to the other, on issues made and presented by the complainant himself, who had himself fixed the proof by formally ordering that the case be heard on bill and answer.

When this court declared that the complainant had acquired from Robert M. Moore no title to the funds in controversy and reversed the lower court, the complainant immediately bestirred himself to bring about yet another hearing of his case. Taking a cue from the observations made by this court on the averments and proof necessary to establish the claim of a person as an innocent, bona fide purchaser, he goes to the court with his motion to modify, wherein he attempts, not only to meet the court's objections as to a lack in that respect in the case presented, but also to take new ground as to the matter of Moore's authority to sell. Finding from the court's opinion that one partner of a dissolved firm has no right, under pretense of settling partnership affairs, to dispose of firm assets which had already been disposed of by both partners, he was in a dilemma. He had contended for two years that there had been a dissolution of the partnership. He had been the first to urge to the court that such dissolution had taken place. He had sworn to it twice, first in his original bill and then in his amended bill, both having been framed by his counsel who, it will be remembered, furnished all the information on the subject. This central fact of dissolution had been the salient point of the complainant's contention. It furnished his vendor with the right and authority to sell the partnership assets. He sold as "the continuing, settling partner of the dissolved firm" (pp. 3, 31, 32, Rec. in No. 1154). The fact of dissolution was both averred and admitted by the defend-

ants and of course the court found the dissolution as a fact established. What does the complainant do in this dilemma? His counsel, who had put the words into the mouth of his client in the first instance (for counsel stated in his affidavit filed in this court in support of the motion to modify that he was the witness having knowledge of all the facts) comes to the rescue and solemnly avows, under oath, that there is doubt after all whether or not there was a dissolution; that all his information was in fact to the contrary; that he now desires to begin anew and retry the matter on the new theory that there was no dissolution, the law being, if there were no dissolution, that Robert M. Moore must have had the right to sell by virtue of his agency as a partner in the firm.

It is certainly hard for the defendants to be patient under the circumstances. Where are their rights? For whom are courts of law instituted? Are cases, submitted for final adjudication, to be resubmitted again and again because a party openly repudiates in a second suit the facts he swore to and made the basis of his contention in the first suit? Can a lawyer say to a court of last resort, "I tried this case before on the theory that the fact was so and so. Now my client will aver that the fact was the contrary (being guided by information brought to him by myself in both cases), and I desire to try it now on the other theory." There is an old-time maxim that "one must come into equity with clean hands." Is it possible that such a maxim has no application in this instance?

The complainant in these proceedings constantly assumes that nothing whatever was decided as to his title, or the facts in dispute, between the parties herein, by the former suit. The trouble with that assumption is that the law does not support it in even the slightest degree. The presumptions of law are entirely the other way. Here is a decree of this court, the highest that can speak in the matter, that the complainant does not own these funds.

The decree on its face is final and absolute. At once the strongest presumption arises that the decree settles the controversy. The burden is upon the complainant to get rid of the effect of that decree. How does he attempt to do it? First, he applies to this court and asks your Honors to allow him to amend his bill, or in any event to make the decree of this court such as will allow him to litigate the matter over again. Your Honors flatly refuse him that privilege. He then utterly disregards the decree and adjudication; files a new suit which does not even so much as mention the former adjudication; assumes that absolutely nothing whatever was settled by the two years of litigation then ended. Like the ostrich, he closes his eyes and shoves his head into the sand, assuming there is no danger, because he declines to notice it. And thereafter, at every step, he blithely assumes that the burden is upon these defendants to inform the court of what it has done! He is still at liberty, as against these defendants, to assert a claim of ownership to certain funds in the hands of the United States Treasurer, and these defendants must prove to the court that he is concluded by the decree (if there be any?) which was made on his former bill against these defendants touching those identical funds! The action of the court solemnly recorded in the former suit is a mere nullity, an aggregation of idle words, because, forsooth! the complainant, through his counsel, tenders himself ready in a second suit to swear that he did not fully and truthfully in his first suit set forth the facts touching the *consideration* he paid for the moneys in dispute! He paid, when he purchased what the seller was without authority to sell, a much larger (?) sum than he said in his first suit, and, therefore, he is at liberty to litigate the matter anew! Or, mayhap, because he swore in his first suit that the partnership between Wagenhurst and Moore was dissolved and that Moore (from whom Wineland claims title) was the continuing and settling partner, but is willing to swear now that he is *ignorant whether there was a*

dissolution or not, that fact (his pretended ignorance of a dissolution, which neither his knowledge nor his ignorance can affect one way or another) gives him a right to litigate anew!

It is difficult to speak with patience about this litigation. The complainant, in his former suit, three times ordered the case to hearing on bill and answer. At one such time, October 18, 1900, he took leave to amend (p. 30 of Rec. in No. 1154); at another (May 31, 1901,) he was dismissed from the court (p. 49, Rec., ditto); he petitioned for a vacation of that decree (p. 50, ditto); the petition was granted June 22, 1901 (p. 55, ditto); and November 15, 1901 (p. 55, ditto) he was given all the relief prayed for in his bill. When that decree of November 15, 1901, was here, and he prayed in this court to be allowed to readjust his allegations and take testimony, these appellants, through their counsel, adverted to the fact that the most favorable view possible to this complainant had appeared in a hearing on bill and answer; and, in opposition to the prayer made by him in this court, they pointed out some aspects of the matter which, if testimony were gone into, would show the case from its inception to be reeking with *mala fides*. This court denied the relief he prayed and put a judicial end to his claim by directing an absolute dismissal of his bill. And upon the dismissal, made in accordance with the mandate of this court, these appellants stand.

The law is plain. As said in 5 Allen (Mass.), 377: "The bill was dismissed without any words of qualification. It was not dismissed 'without prejudice' or 'with leave to bring another suit.' This is a judgment which, as was settled in Foote *v.* Gibbs, 1 Gray, 413, 'is conclusively presumed to be upon the merits, and is a final determination of the controversy.'"

As said by Justice Field, speaking for the court in Durant *v.* Essex Co., 7 Wall., 109: "It is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court

to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal." Justice Field, referring to the matter then before the court, had previously said, on page 109: "The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties."

The litigation between Durant and the Essex Company came again before the Supreme Court in 101 U. S., 555, when Chief Justice Waite, speaking for the court, and giving the history of the matter then before them, said (p. 556):

"When our mandate went down, the present appellant, in May, 1858, asked the Circuit Court that he might have leave to discontinue his suit, or, if that could not be done, that his 'bill might be dismissed without prejudice.' All these several requests were refused.*

"Afterwards, the appellant filed a new bill in the Circuit Court to obtain the same relief as in the old suit, but setting up what he called new matter. To this bill the former decree was pleaded in bar, and the plea sustained by the Circuit Court, because the first bill had been dismissed absolutely. From that decree an appeal was taken to this court, and at the December term, 1868, in Durant *v.* Essex Co. (7 Wall., 107), we decided that the decree, absolute in its terms, dismissing the bill on the merits, was a final determination of the controversy, and constituted a bar to any further litigation of the same subject between the same parties.

"Thereupon, on the 29th of June, 1874, the appellant filed a petition in the Circuit Court setting up these facts and his newly-discovered matter, and asked that the decree affirmed here in 1858 might 'be revoked or so modified that his bill of complaint be dismissed without prejudice to his further pro-

ceeding at law or equity.' This petition was denied, and to reverse that order the present appeal was taken.

"Waiving all questions as to the right of appeal from such an order, we are clearly of the opinion that the Circuit Court could not do otherwise than it did. On a mandate from this court affirming a decree, the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established.* After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The Circuit Court had no power after that to do what we might have done and did not do."

In Lyon *v.* Perin Manufacturing Co., 125 U. S., 698, a decree which had dismissed a former bill of complaint was pleaded in bar of a second suit. It was stated in an affidavit by the clerk of the court that no proof or testimony in the former cause had been filed by either the complainant or defendant; that complainant did not appear either in person or by counsel at the making of the decree, and that the decree dismissing the bill was granted on default of the complainant. The court said (page 702): "This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties," and the opinion quotes approvingly from Cooper Eq. Pl., 270, as follows: "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms, without prejudice."

It is impossible to suppose that this court, if it had believed that the complainant had rights or an equity that had not been

passed upon and justly decided, would have denied to him the privilege of further litigation. The complainant, in his motion in this court to modify, had laid his whole case, or the case he claimed the privilege to go to proof on, before the court. He made in this court fourteen printed pages of additional averments, by way of affidavit, to support his request for further consideration of his alleged equity. Every one of the averments so made was known to the complainant at the time he filed his bill, both the original bill and the amended bill, in the former suit. There was no pretense that new evidence had been obtained. The same individual who had put words in the mouth of the complainant for the construction of his first bill, furnished the averments and information in the affidavits presented in this court on the motion to modify, which now constitute a part of the bill in the present case. This court knew the situation thoroughly. Its attention was called in the most unmistakable way to the fact that its decree was absolute in its terms, final and irrevocable, except by itself. Even the fact that the decree would be a bar to another suit, if left unchanged, was presented (page 15 of motion to modify in No. 1154). That motion to modify, embracing 32 printed pages, was in fact an elaborate and exhaustive presentation of the court's power and discretion to allow amendment or modification of its decree, over 75 cases being cited in the course of the brief which accompanied it. On pages 17-18 (motion to modify) the brief reads: "Instances of affirmances and reversals and remandings, with leave to amend, to take further proofs, or for other proceedings not inconsistent with law and the opinion of the appellate court, are very numerous. It may be safely stated as the general rule that if the complainant may *possibly* make out a case, he will not be put out of court at once."

Indeed, the force of the case as presented along these lines by the complainant in his motion to modify, merely emphasizes how little this court must have thought it would subserve

the ends of justice to allow further proceedings. In 9 App. D. C., 383, Bryan *v.* May, (cited by complainant in his motion to modify, p. 29) this court said: "To subserve the ends of justice, the decree will be modified so as to read dismissed without prejudice, and, as so modified, affirmed with costs. The complainant will therefore be free to file another bill." Again, in Chester *v.* Morgan, 11 App. D. C., 435 (cited by the complainant in his motion to modify), the court says: "But inasmuch as the complainant's statement of his case, inadequate though it be, manifests some equity, which he may possibly be able to state and to sustain by adequate proof, we think the decree of dismissal should be without prejudice to him to institute another suit in the premises if he be so advised." Quoting again from the motion to modify (p. 29), "Wherever the justice and equity of the case require it, the dismissal of a bill in equity will be without prejudice."

When this court, with all the changed and additional averments before it, contained in his motion to modify, and the appeal of the complainant based thereon to be allowed to litigate further, refused to him that privilege, can there be any doubt as to what this court thought of his right to the moneys he was laying claim to in the hands of the United States Treasurer? Did this court, by its act in overruling the motion to modify its decree, not declare conclusively that further litigation by the complainant against these defendants touching those moneys would be contrary to the ends of justice? And all this was adverted to by these appellants in their defense in the court below. What shall we say, then, of the parties who have made it necessary for these appellants to come back and bring with them to this court a thing which has the form and verisimilitude of a decree of the Supreme Court of the District of Columbia, a thing which would be entitled to the respect properly belonging to the decree of a court of competent jurisdiction, except that it was made under the shadow and in the teeth of the mandate of this court. Made

under such circumstances, the decree, so-called, however artificially painted, can be nothing but a lifeless form, undeserving of respect, and even the maker of it would not be able to command respect for it, though for the irreverent he should heat, seven times over, the furnace reserved for those who fail to pay homage to the decrees of a court. The image which Nebuchadnezzar in the Bible story wished the people to fall down before and worship as a god was no more lacking in the soul and spirit of divinity than is the image we show here devoid of the soul and spirit of law. It may be an evidence of the handiwork of the man who made it; it is not a likeness which bodies forth the law in the case.

The question may well be asked whether the complainant in these proceedings and his solicitor (the latter having been the active party in everything done concerning the funds in controversy, including the original pretended purchase of them) are not, in the bringing of this new suit, in contempt of this court. They had nothing to complain of in regard to their former suit. In that suit they made their own issues and on them submitted their cause three times over. In matters touching the presentation of that cause, or the proof thereof, they are entitled to no sympathy or indulgence whatever. But the matter goes now further than that. When a court makes its meaning and judgment as clear as this court did in that suit; when it makes a final and absolute decree settling a subject of controversy; and when afterwards it is expressly requested to change such decree, for reasons fully set forth, and it explicitly refuses to do so, or to countenance any further proceedings in the matter; and when the parties thereafter, in the face of the court's refusal, and affirmatively expressed attitude upon the alleged equities of their cause, proceed to file a new suit in a subordinate tribunal to compel further consideration of the matter, occupying the time of the courts with useless litigation, subjecting the opposing parties to renewed expense and annoy-

ance; preventing, by unwarranted and unreasonable interference, the payment of the funds to which the court has told them they have no claim whatever, it is respectfully submitted that such conduct is hardly to be excused as mere senseless importunity; it borders close upon contempt of the tribunal which ordered them to cease their false clamor.

It is submitted further that this court, in directing a second time that the complainant herein be dismissed from the portals of a court of equity, should direct that such second dismissal be with an injunction that he shall not again enter a court of justice with the assignment made to him by Robert M. Moore on December 21, 1898, and claim, as a result of such assignment, any right, title or interest whatever in the funds which are still due under contracts Nos. 2361 and 2390, made with the District of Columbia in 1896 and 1897, respectively, for work done in the construction of sewers.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
For the Appellants.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

ELLWOOD O. WAGENHURST, ET AL., *Appellants*,
v.
ELIAS WINELAND, *Appellee.*
No. 1310.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal from a decree (R. 70–71) of the Supreme Court of the District of Columbia, awarding the appellee certain retained moneys.

The appellee filed his bill (R. 1–28) to establish his ownership of the said moneys against the appellants Wagenhurst, Reyburn and Little, and also against Ellis H. Roberts as Treasurer of the United States and *ex-officio* Commissioner of the Sinking Fund of the District of Columbia (who holds the said moneys), and Robert M. Moore. The said Roberts and Moore have not appealed (R. 72) from the said decree, but the former allowed the decree to go by default as against him (R. 68), and the latter by consent (R. 69–70).

The appellants first filed what they called a plea (R. 36–40) to the bill. This was amended and then set down for argument (R. 45), and overruled (R. 46); and they were directed to answer the bill (R. 46). Thereupon they filed what they

called an answer (R. 47–52) to the bill. To this so-called answer exceptions (R. 52–53) were filed and sustained (R. 66–67) and they were directed to put in a sufficient answer to the bill (R. 66–67); but in this they defaulted, and therefore an order *pro confesso* was entered against them (R. 70); at the next term of the court a final decree *pro confesso* was duly passed against them (R. 70–71), and from this decree they have appealed to this court (R. 72).

THE PLEA.

Notwithstanding the reservation in the answer concerning the plea (R. 47), the order (R. 46) overruling the plea is not presented for review by this appeal; nor can the appellants now question that order, because they have not sought an appeal from it, but have acquiesced in it by filing what they term an answer, under the requirement of that order. It is the general rule that if a party acquiesces in an order of the court below, he will not be permitted to assign such order for error in the appellate court. 2 Cyc., 644–646, and cases cited.

If this plea be considered at all, a mere glance at it will show that it is so radically and fatally defective both in substance and form as to render its overruling inevitable. It is fatally defective in respect to the certificate and affidavits acompanying it (R. 39–40). It fatally omits to aver that the former decree of dismissal was on the merits. It does not even allege that the decree of this court directing the dismissal was on the merits. The decree of dismissal is not even exhibited with the plea, nor is the record in the former suit exhibited. The allegation is (R. 38): "All of which will more fully and at large appear by reference to the proceedings, record and decree in said equity cause No. 21698, which said cause is here specially referred to and prayed to be read and considered as a part hereof." The actual exhibition of the former record is essential to this attempted plea of

res judicata; for otherwise it amounts to pleading only a mere legal conclusion instead of facts. As if the appellants, at the conclusion of their plea, became partially conscious of this defect, they added the following (R. 38–39): "The said defendants file herewith as a part hereof a copy of the record in the Court of Appeals in said above-mentioned cause No. 21698; also a copy of the motion made and filed by the complainant for a modification of the decree made by the Court of Appeals; and a copy of the briefs used in the said court by the parties adversary to said complainant Wineland, including a printed copy of their statement in opposition to the motion by said Wineland for a modification." Yet they wholly failed to exhibit the decrees, either of this court or the court below, with their plea. The pleadings in a former case never constitute *res judicata;* and still less do briefs and arguments of counsel, and *ex parte* unsworn printed statements of counsel, reciting new matter in the appellate court, outside of and foreign to the record of the particular case in that court. Notwithstanding their failure to exhibit the former record, they conclude their plea in these words (R. 39): "And the matters and things set forth in the said former proceedings, record and decree, the said defendants do aver and pleas in bar of complainant's present bill of complaint." Whether they intended to plead a decree of this court or of the court below, or the mere pleadings and other papers in a former suit, as *res judicata,* is doubtful. At all events, they exhibited neither decree nor a proper record with their plea and hence presented nothing but a mere legal conclusion Of course, the simple reference to the "proceedings, record and decree" in the former suit, coupled with a prayer that that cause may be "read and considered as a part hereof," does not present such "proeedings, record and decree" in this case, nor make them any part of the record of this suit.

The rules of the court below are the law of that court, and cannot be dispensed with to meet the exigences of a parti-

cular case. D. C. *v.* Roth, 18 App. D. C., 547, 29 Wash. Law Rep., 702; D. C. *v.* Humphries, 11 App. D. C., 68; Queen's Case, 182 U. S., 456, 29 Wash. Law Rep., 380; Talty *v.* D. C., 30 Wash. Law Rep. 774, 20 App. D. C., 489.

"The practice in said court (Supreme Court of the District of Columbia sitting as an Equity Court) shall be according to the established course of equity and procedure and the rules established by the said Supreme Court of the District not inconsistent with law."

Code D. C., Sec. 85.

"No demurrer or plea shall be filed unless upon a certificate of counsel that in his opinion it is well founded *in law*, supported by the affidavit of the defendant *that it is not interposed for delay*, and, if a plea, that it is true in fact." Equity Rule 28, Supreme Court, D. C. This rule was drawn almost literally from U. S. Eq. Rule 31.

Compare the original certificate and affidavits accompanying the plea with this rule, and the fatal defects in both will instantly appear. It is true that leave of court was given to amend the certificate and affidavits, and under such leave the plea was amended by the appellants, piecemeal and in instalments; so that, to get their plea in even formal shape, it became necessary to consider (1) the original plea (R. 36–40); (2) the order allowing it to be amended (R. 42); (3) the amended affidavit of Wagenhurst (R. 42–43); (4) the amended affidavit of Little (R. 43); (5) the amended certificate of counsel (R. 44), and (6) the amended affidavit of Reyburn (R. 46). The order allowing the amendment did not contemplate any such piecemeal proceedings, but one paper in proper form; nor does the rule of the court below requiring the certificate of counsel and affidavit of defendant recognize a plea as such which is subsequently certified and verified in instalments, or supported by an answer subsequently filed; but the plea, certificate and affidavit are to be one perfect entity, coupled with a proper supporting answer.

Pleas in equity are the most highly technical of all pleadings, and are to be strictly construed. Alex. Ch. Pr. 58; Mackey Practice and Procedure, 384; Rousknep *v.* Kershner, 49 Md., 516; Chase *v.* McDonald, 7 H. and J., 160. This is because no demurrer or special replication lies to them. Barrett *v.* McAllister, 35 W. Va., 103. It is just as necessary to verify properly a plea of matter of record as of matter *in pais.* Wagoner *v.* Wagoner, 76 Md., 311 (Md. Code, Art 16, Sec. 136, follows U. S. Eq. Rule 31 in its provisions regarding the verification of pleas in equity). A plea of *res judicata* must be properly verified. Wagoner *v.* Wagoner, 76 Md., 311; Cates *v.* Loftus, 4 T. B. Mon., 441; Wall *v.* Stubbs, 2 Ves. & B., 354. See Common Law Rule 87 of Supreme Court, D. C., Md. Act., 1785, Ch. 80, Sec. 3; Mackey Pr. and Pro., 97, and Code D. C., Sec. 1534, as to the necessity of properly verifying pleas of matters of record; and also Loeber *v.* Moore, 20 D. C., 1.

But passing these defects and assuming that the six different papers finally presented one plea in proper form, still the fatal defects in substance remained.

Another rule of the court below provides:

"But in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded." Eq. Rule 29, Supreme Court, D. C. This rule excepts no case. It is merely declaratory of the general rule of equity pleading. Edelin *v.* Lyon, 1 App. D. C., 87; Taylor *v.* Duncanson, 20 D. C., 505. See also, U. S. Eq. Rule 32.

The bill in this case "specially charges fraud and combination" in numerous details, yet no answer accompanied the plea, and for this reason also it was properly overruled. The argument of a plea includes the question whether it is properly supported by an answer. 1 Bates, Fed. Eq. Pr., Sec. 294.

As above stated, the appellants cannot assign for error the

order overruling their plea, because they acquiesced in it. While it is true as a general rule that an appeal from a final decree in equity brings up the entire record, yet this does not mean that it brings up for review every interlocutory order or decree in the case; but, on the contrary, it is established that such an appeal does not present for review any interlocutory orders or decrees which definitely adjudicated and disposed of questions prior to the final decree. Gibson *v.* Gautier, 1 Mackey, 35; Forrester *v.* Forrester, 40 Ala., 557; Kellett *v.* Rathbun, 4 Paige, 102; Mapes *v.* Coffin, 5 Paige, 296; New Orleans *v.* Crescent City, 41 La. Ann., 904; Boynton *v.* Sisson, 56 Wis., 401. In Dodge *v.* Allis, 27 Minn., 376, the court held that on an appeal from a final decree confirming the title of a purchaser, an interlocutory order or decree, fixing the sum due and directing a sale, could not be reviewed. Hence, under this rule, this appeal does not bring up for review the order overruling the plea; and especially so as this court could have allowed an appeal from this order. 3 Cyc., 228, and cases cited in note 78, *ad finem*.

It is therefore deemed unnecessary to cite the numerous cases showing that the formal defects of the plea are fatal; nor any of those relating to amendments of pleas in equity; nor any of those relating to the essentials or pleas of *res judicata*. In any event whatever the order overruling the plea was right.

It is to be added that even that part of the record of the former suit which the plea alleges is filed "herewith as a part hereof," is not in the record on this appeal, but was in express terms omitted therefrom by the appellants (R. 73–74). Not being in the record in this case, it is not before this court. Nothing can be considered here with respect to any former case, except only what this record shows upon its face. This court has not even before it the same record which the court below had, but one from which much matter has been purposely omitted by the express order (R. 73–74) of the appel-

lants. They made no attempt to serve on the appellee a copy of their order for the transcript, as they should have done under the rule of this court. Of course, no appellate court will take judicial notice, in deciding one case, of what may be contained in its own record in another and distinct case; but it must be brought to the attention of the court by being made a part of the record in the very case under consideration. The authorities to this point and others mentioned above will be found cited hereinafter.

As to the plea, therefore, it is submitted (1), that it is fatally defective in form; (2), that it is fatally defective in substance; (3), that the order overruling it cannot be questioned now by the appellants; (4), that this order is not presented for review by this appeal, and (5), that if it is, yet it is right. This order is not final nor appealable of itself. Edelin *v.* Lyon, 1 App. D. C., 87. The appellee was not required to reply to this bad plea nor to set it down to be argued, at least before the amendments. It was a mere nullity, and could be wholly disregarded and a *pro confesso* entered. Edelin *v.* Lyon, 1 App. D. C. 87; Central Bank *v.* Conn. Ins. Co., 104 U. S., 54; Sheffield *v.* Witherow, 149 U. S., 574; American Steel and Wire Co. *v.* Wire Drawers' and Die Makers' Unions, 90 Fed. Rep., 598; Preston *v.* Finley, 72 Fed. Rep., 850; 1 Bates Fed. Eq. Pr., Sec. 291; Goodyear *v.* Toby, 6 Blatchf., 130; Ewing *v.* Blight, 3 Wall. Jr., 134; Taylor *v.* Brown, 13 Sou. Rep., 957; Keen *v.* Jordan, 13 Fla., 327; 1 Beach Mod. Eq. Pr., Sec. 323; Brazoni *v.* Youngstown, 90 Fed. Rep. (C. C. A., 1897) 10, 13; Wagoner *v.* Wagoner, 76 Md., 311.

An objection to the equity of the bill "must be taken by demurrer and not by plea." "A plea which avoids the discovery prayed for is no evidence in defendant's favor, even when it is under oath and negatives a material averment in the bill." Farley *v.* Kittson, 120 U. S., 303.

THE ANSWER.

I assume that the appellants will contend for reversal because (1) their answer is good, and (2) proves itself. Neither contention is valid. Again I invoke the rules of the court below:

"The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea," etc. Eq. Rule 30.

"If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period. * * * And upon such overruling the defendant shall answer the bill or so much thereof as was covered by the plea or demurrer, at the next succeeding rule-day, or at such other time as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken *pro confesso*, and the matter thereof proceeded in and decreed accordingly." Eq. Rule 31.

Under this Eq. Rule 31 the appellants were required to answer the bill by the order (R. 46) overruling their plea. As the plea was to the whole bill, the answer required was necessarily to be to the whole bill.

In default of an answer by Eq. Rule 53, "the proceedings shall be the same as are prescribed in case of default in appearing. (Equity Rule 16)."

By Equity Rule 16, in default of appearance "the plaintiff may, on application to the court, obtain an order that the bill be taken *pro confesso*, and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly," etc.

By Equity Rule 17, "when the bill is taken *pro confesso* the court may proceed to a decree at the next ensuing term

thereof, and such decree shall be deemed absolute unless the court shall, at the same term, set [it] aside or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant," etc.

"The answer, after the introductory part of it, shall be divided into paragraphs in the same manner as the bill, and each paragraph in the answer shall correspond with the paragraph in the bill of the same number." Eq. Rule 54.

"The plaintiff shall be allowed ten days, exclusive of Sundays, after an answer is filed, and notice thereof is given to the plaintiff's solicitor, to file exceptions thereto for insufficiency," etc. Eq. Rule. 56.

"Where exceptions to the answer for insufficiency are filed within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer within ten days, exclusive of Sundays, and give notice thereof to the plaintiff, the plaintiff shall forthwith set them down for hearing," etc. Eq. Rule 57.

"When exceptions are allowed, the defendant shall put in a full and complete answer within ten days, exclusive of Sundays; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant shall not be discharged from custody upon such writ except by an order of the court, or of a justice thereof, upon his putting in such answer and complying with such other terms as the court or justice may direct." Eq. Rule 58.

"The party prevailing at the hearing upon exceptions to the answer shall be entitled to all costs occasioned thereby, unless otherwise directed by the court or a justice." Eq. Rule 59.

The foregoing rules were drawn from the U. S., Equity Rules.

Here the plea was set down to be argued under Eq. Rule 30. It was overruled, and the appellants were directed to answer under Eq. Rule 31. They filed an answer Exceptions for insufficiency (R. 52–53) were filed to this answer, under Eq. Rule 56. The appellants did not submit to these exceptions, and they were set down for hearing, under Eq. Rule 57. These exceptions were allowed (R. 66–67), and the appellants were directed to put in a sufficient answer, under Eq. Rule 58. They refused to file such answer (R. 55, 67, 69), and an order *pro confesso* (R. 70) was passed against them, under Eq. Rule 58. A *pro confesso* order was also passed against the defendant Roberts (R. 68), under Eq. Rule 53, for default in answering after his appearance. Thereafter the final decree (R. 70–71) was passed, under Equity Rules 16, 17 and 53.

It therefore appears that the appellee's proceedings were in strict conformity to the rules of the court below, and that the prior orders of that court, as well as the final decree, were based upon those rules.

In the first place, the answer wholly failed to comply with the requirements of Eq. Rule 54.

In the second place, the appellants totally failed to answer any paragraphs or allegations of the bill, except only the formal paragraphs 1 and 2 thereof.

In the third place, the answer was not an answer at all within the established technical meaning of the word. At the most, it was but a mere repetition, almost literal, of the language and form of the overruled plea. It was nothing but the plea repeated almost *in haec verba* under the mere name, guise or cover of an answer. It was an answer in name only. Having failed to protect themselves from an answer by their plea, the appellants were bound to answer fully and completely each and every material paragraph and allegation of the bill. The answer which they filed utterly failed to comply with the established requirements of

answers in equity. If the appellants intended to stand upon the allegations of their plea, they should have elected so to do, and then appealed from a decree against them. Having abandoned that plea, and submitted to answer, they cannot be permitted to repeat merely the form and words of their bad plea under the mere name of an answer, and then, after exceptions to it have been sustained for insufficiency and a decree entered against them, appeal from such decree as a means of having the appellate court review the order overruling the abandoned plea; for this would be doing now indirectly what they cannot now do directly. 2 Cyc., 644–646.

In the fourth place, the alleged defense of *res judicata* was nothing but a mere legal conclusion, as the record of the former suit was not exhibited with the answer. Even the former decree of dismissal was irregularly filed; but it alone was not a sufficient exhibition of the former record to present a well-pleaded defense of *res judicata.*

The proper office of an answer is to meet all the allegations of the bill, preparatory to going into the evidence at large. The office of a plea in equity is to confess and avoid. Farley *v* Kittson, 120 U. S. 303, 304 (an excellent case involving the practice upon plea in equity). When the plea was overruled, the appellants were bound to answer or suffer default or arrest, by Eq. Rule 31; and when they answered, they were bound to answer fully. Even if they had set up their special defense in the first instance by answer instead of plea, yet they would have been bound to have answered at least as fully and completely and to the same extent as they were required to answer in support of their plea—this by an express rule of the court below, drawn from the U. S. Equity Rules. To the same point, 1 Bates Fed. Eq. Pro., Secs. 314, 315. If any material fact charged in the bill be not answered, this is good ground for exception to the answer.

Hardeman *v.* Harris, 7 How., 726, 729.

"Generally, if a defendant attempts to make defense by answer, he must answer fully all the statements and charges of the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose. * * * If the answer be in any respect evasive or insufficient the plaintiff may except to it, and thus extract from his opponent a full and perfect answer. * * * The answer should be certain as far as practicable; and to so much of the bill as it is necessary to answer the defendant must speak directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but must confess or traverse the substance of each positively and with certainty; particular, precise charges must be answered particularly, and not in a general manner. * * * The answer should consist of averments of facts, not of conclusions of law." 1. Ency. Pl. and Pr., 873, 874, 875, 878; Neale *v.* Hagthrop, 3 Bland 551; Chappel *v.* Funk, 57 Md., 465; Story Eq. Pl. (10th Ed.) Secs. 38, 846. Md. Chancery Rule 23 is an exact copy of U. S. Equity Rule 39, as to answers in equity. An allegation that a former decree of dismissal was on the merits is not an allegation of a fact, but of a mere legal conclusion. 12 Ency. Pl. and Pr. 1020–1046. A defendant whose answer, on exceptions, has been held insufficient, or who has on demurrer or plea failed to protect himself from answering as the bill requires, may be attached and compelled to answer. Buckingham *v.* Peddicord, 2 Bland, 447; Eq. Rules 16, 58. Or the bill may be taken *pro confesso.* 1 Ency. Pl. and Pr., 895; Eq. Rule 58. Where an answer sets up questions of law instead of facts, exceptions are well taken. Craig *v.* People, 47 Ill., 487.

The defendant must make full discovery in his answer, and the answer must be full, direct, without evasion, must not answer the charges merely literally, must confess or traverse the substance of each charge, etc. 1 Bates Fed. Eq. Pro., Secs. 316–319. Admissions in the answer are con-

clusive. 1 Bates Fed. Eq. Pro., Sec. 325. After exceptions to an answer have been sustained, the defendant must answer further or suffer a *pro confesso* or attachment at the complainant's election. Eq. Rules 58 (from U. S. Eq. Rule 18). See also Eq. Rules 16 and 53. 1 Bates Fed. Eq. Pro., Sec. 348. As to exceptions to answers in general, see 1 Bates Fed. Eq. Pro., Secs. 352–363. In Sec. 353 exceptions for insufficiency are defined. In Sec. 354 it is stated when such exceptions will be sustained. In Sec. 356 the forms and requisites of exceptions for insufficiency are stated. In Sec. 358 the procedure on such exceptions is set forth, as it is in Eq. Rule 57. In Sec. 358 the matter of further answer, upon allowance of exceptions, is considered, as it is in Eq. Rule 57. In Sec. 361 exceptions for impertinence are defined. An answer may be excepted to for insufficiency "if the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments, or by a proper answer." 1 Bates Fed. Eq. Pro., Sec. 315. "Where new matter, not responsive to the bill, is stated in the answer, if such new matter is wholly irrelevant and forms no sufficient defense to the case for relief made by the bill, the plaintiff may except to the answer for impertinence." 1 Bates Fed. Eq. Pro., Sec. 354, citing—Stafford *v.* Brown, 4 Paige, Ch. 88; Buloid *v.* Miller, 4 Paige, Ch. 473; Brooks *v.* Byam, 1 Story, 296; Redesdale (6th Am. Ed.) 376; Cooper's Eq. Pl., 319. "Material allegations in the bill of complaint ought to be answered and admitted or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts or waive that branch of the controversy. * * * Proper remedy for a complainant in such a case is to except to the answer for insufficiency within the time prescribed by the sixty-first rule." Pierce *v.* Brown, 7 Wall., 205.

"Where an answer is incomplete or evasive, it may be excepted to for that reason." Whitaker *v.* Middle States Co., 7 App. D. C., 203, 208.

"The rules of practice by which the court was governed, and the regular order of proceedings," should be vindicated. Washington *v.* Bradley, 10 Wall., 299 (appeal from Supreme Court D. C.). The radical difference between the effects of setting down exceptions to answers and proceeding to final decree upon their allowance, and setting down a cause for hearing on bill and answer, is fully and very explicitly stated in the case of *In re* Sandford, 160 U. S. 247. If an answer be excepted to, and the defendant does not submit to the exceptions, they may be set down for hearing; and if, upon hearing, they be allowed, then the defendant "must put in a full and complete answer, otherwise the plaintiff may take the bill, so far as the matter of exceptions is concerned, as confessed." *In re* Sandford, 160 U. S., 247; Eq. Rule 58, Supreme Court D. C.

As to exceptions to answers in general, see 1 Ency. Pl. and Pr. 895–910. Of course, the waiver of an answer under oath is not a waiver of the right to a full answer and full discovery from the defendant. 1 Bates Fed. Eq. Pro., Secs. 118, 356. Ryan *v.* Anglesea, 12 Atl. Rep. (N. J.), 539.

Whittemore *v.* Patton, 81 Fed., 527.
National *v* Interchangeable, 83 Fed. 26.
Uhlmann *v.* Amholt, 41 Fed., 369.
Gamewell *v.* Major, 31 Fed., 312.
Colgate *v.* Campagnie, 23 Fed., 82.
Reed *v.* Cumberland, 36 N. J. Eq., 393.
Patterson *v.* Gaines, 6 How., 588.
Union *v.* Barry, 5 Pet., 99.
Kittridge *v.* Claremont, 1 W. & M., 244.
Hudson *v.* Wood, 119 Fed., 764.
Bartlett *v.* Gale, 4 Paige, 503.
Manley *v.* Mickle, 55 N. J. Eq., 567.

So exceptions will lie to the answer of a corporation, although it cannot be compelled to answer under oath, if it does not answer fully under its corporate seal.

Gamewell *v.* Fire, 31 Fed., 312.
Reed *v.* Cumberland, 36 N. J. Eq., 393.
Colegate *v.* Campagnie, 23 Blatchf., 88, 23 Fed., 82.
Hale *v.* Continental, 16 Fed., 718.
Kittridge *v.* Claremont, 1 W. & M. 244, 3 Story, 590.

As to answers in equity in general, see 1 Bates Fed. Eq. Pro., Secs. 307–349.

The answer does not even allege that the former decree of dismissal was on the merits, or was "signed and enrolled," except possibly by a very strained construction (R. 48). No part of the former record is exhibited with the answer except a copy of the former decree of dismissal. This decree expressly professes to dismiss merely in conformity with the mandate of this court, and nothing more. Even the copy was irregularly filed, because filed after the answer (R. 53, 56–58). The attempted exhibition of the record of the former proceeding by mere reference to it, is futile. This reference (R. 48) is: "All of which will more fully and at large appear by reference to the proceedings, record and decree in said equity cause No. 21698, which said cause is hereby specially referred to and prayed to be read and considered as a part hereof."

This reference follows literally the reference in the plea (R. 38). It certainly brought no part of "the proceedings, record and decree in said equity cause No. 21698" into the record of this cause; and certainly no part thereof is in the record before this court on this appeal, except only what is merely alleged but not proved to be a copy of a certain decree in the former case.

In Cammack *v.* Carpenter, 3 App. D. C., 219, 226, an appeal from a decree in equity, the court, per Mr. Ch. J. Alvey, said:

"None of the deeds referred to in the bill were filed as exhibits therewith, and, of course, they do not constitute any part of the record before us on demurrer to the bill. Exhibits must be actually filed, as parts of the record, to be reached and brought under the consideration of the court, on demurrer to the bill or petition. A mere reference to records or to the registry of deeds, existing independently of the record in the particular cause, cannot be considered as bringing such records or deeds before the court, and making them parts of the bill. The record of each case must be complete in itself; and a mere reference to matters of record, *whether under control of the court in other cases or proceedings*, or to be found upon examination in some other office or place of depository, cannot be taken as a substitute for the actual filing and presentation of the matter referred to, and intended to be brought to the attention and consideration of the court. To enable the court to declare the construction, or to determine the question as to the due and legal execution of an instrument, the instrument itself, or copy thereof, should be presented to the court, as part of the record of the case. That was not done in this instance, and the defect in this particular was sufficient of itself to justify the court below in sustaining the demurrer to the bill."

In Whitaker *v.* Middle States Co., 7 App. D. C., 203, 207, the court, per Mr. Justice Shepard, said:

"We have had occasion heretofore to condemn the practice of referring in the pleadings to the records of deeds and mortgages with a view to making them parts thereof, without annexing and filing copies as exhibits. Cammack *v.* Carpenter, 3 App. D. C., 219, 226. In that case it was said by the Chief Justice: 'A mere reference to records or the registry of deeds, existing independently of the record of the particular cause, cannot be considered as bringing such records or deeds before the court and making them parts of the bill. The record of each case must be complete in itself.'

"Where * * * the case turns, in whole or in part, upon the construction to be given to an instrument of writing, the original, or a copy, should be filed as an exhibit. The deeds in this case, however, are in the record, copies having been filed at the request of the court, and considered at the hearing. This, *though done in an irregular way*, was not objected to at the time, and, for the purposes of this appeal, must be regarded as substantially equivalent to an amendment of the bill in that respect."

Eq. Rule 9 of the court below provides: "Defendants shall not be required to file an answer, plea, or demurrer to any bill or petition until all the exhibits referred to and prayed to be taken as part of said bill or petition shall be actually exhibited and filed."

There is no doubt but that the same principle applies as fully to pleas and answers as to bills and petitions, both upon reason and authority. It is absolutely necessary that the record of the former case shall be actually exhibited and filed in order to well plead *res judicata;* for otherwise the pleader states only a mere conclusion of law. It is essential both to plead and prove the defense of *res judicata.* Judicial notice cannot be invoked to supply an omission either to plead or prove this defense. It does not plead itself, nor does it prove itself; nor can it be pleaded or proved by the doctrine of judicial notice. This court cannot look beyond the record in this very case for its decision. It will not take judicial notice, in deciding this case, or what may be contained in its own record in another and distinct case, unless it be brought to the attention of the court by being made a part of the record in this particular case.

Fry *v.* Chicot, 37 Ark., 117.

Magloughlin *v.* Clark, 35 Ill. App., 251.

Garretson *v.* Ferrall, 92 Iowa, 728.

Enix *v.* Miller, 54 Iowa, 551.

Thomas *v.* Chicago, 48 Pac. 11 (Kan., 1897).

Central Union *v.* Andrews, 34 Kan., 563.
National *v.* Bryant, 13 Bush (76 Ky.), 419.
Ecton *v.* Louisville, 13 Ky. L. Rep., 428.
Best *v.* Kirk, 2 Ky. L. Rep., 434.
Caldwell *v.* Bruggerman, 8 Minn., 286.
Shelby *v.* Bickford, 102 Tenn., 395.

Defects in a record cannot be supplied by reference to a transcript of the record of another case. State *v.* Wesley, 155 U. S., 542. The Supreme Court cannot refer to the record of a prior case decided by it, for the facts of a case under consideration; but the bill of exceptions must show the facts. Fry *v.* Chicot, 37 Ark., 117. Matters not in the record will not be considered, though they have been brought to the notice of the court in other proceedings. Rogers *v.* Tennant, 45 Cal., 184. The court, on appeal, will not go outside of the record, and refer to its own record or memory of former litigation to the prejudice of the appellee. Magloughlin *v.* Clark, 35 Ill. App., 251. A court cannot in one case take judicial notice of another and different case. Enix *v.* Miller, 54 Iowa, 551. On appeal from a judgment sustaining a plea of *res judicata* which involves a decision as to the issues in a former action, the record of the Supreme Court in such former action cannot be considered where it is not a part of the record in the case under consideration. Garretson *v.* Ferrall, 92 Iowa, 728. On error, the Supreme Court cannot go outside of the record to consider a former proceeding in error to review a prior judgment in the same case. Central *v.* Andrews, 34 Kan., 563. An appellate court will take notice of its own records when properly suggested, but will not take notice, in deciding one case, of what may be contained in its record of another and distinct case, unless it be brought to the attention of the court by being made a part of the record in the case under consideration. Bank *v.* Bryant, 76 Ky., 419. Where there is no pleading or sufficient record upon which to determine whether there is any error

in the judgment, the case will be dismissed, although a record of a former appeal in the same case be suggested to supply the defect. The record of the former appeal must be placed with the new record, under penalty of dismissal. Best *v.* Kirk, 2 Ky. Law Rep., 434. Although the Supreme Court may, with the consent of parties, consult records already on its files, though not copied into the transcript, yet this will never be done when the record was not introduced in the court below. Bonguille *v.* Dede, 9 La. Ann., 292. The Supreme Court will not look beyond the record sent up from the court below for error, even though the fact relied upon appears from its own records. Caldwell *v.* Bruggerman, 8 Minn., 286. Where the record discloses nothing regarding a former suit, the court cannot take judicial notice that the former suit had or had not any connection with the present case, in the absence of evidence to that effect. Banks *v.* Burnam, 61 Mo., 76. The record on appeal cannot be supplemented by reference to the record in another case. Branch *v.* Wilmington, 88 N. Car., 573. The examination of another record, not in evidence in the record of the case on appeal, would be wholly improper in any point of view. The merits or correctness of a decision made in one case can never be dependent on a decision in another, not put in evidence nor in the record in the cause. Such practice of referring to other records or matters *dehors* that which is under consideration would be fraught with dangerous consequences, and tend to unjust decisions between litigants. The hearing and decision of a case should and is required by law to be exclusively upon the record of such case appealed, just as it stood in the court from which it is brought. Armendiaz *v.* Serna, 40 Tex., 291. The appellate court cannot consider a map introduced by counsel, but not made a part of the record. Colorado *v.* Turck, 4 C. C. A.; 54 Fed. Rep., 313. Even stipulations of counsel as to the evidence bearing upon a finding of fact by the court, in a case in which a jury is

waived in writing, cannot be considered on appeal. Spring *v.* Spalding, 116 U. S., 541; Ft. Worth *v.* Smith, 151 U. S., 294. In Anderson *v.* Cecil, 86 Md., 490, the court expressly held that a court could look only to the record in the particular case before it, and could not consider nor take notice of the record in another case in the same court; and Cammack *v.* Carpenter, 3 App. D. C., 219, 226, and Whitaker *v.* Middle States Co., 7 App. D. C., 203, 207, are express decisions to the same effect.

A state appellate court is not required on a writ of error to examine a transcript of the record of a federal circuit court, *which was made no part of the record in the trial court*, for the purpose of showing that the cause was in fact removed to the federal court before the trial.

Kanouse *v.* Martin, 15 How., 198.

Pa. Co. *v.* Bender, 148 U. S., 255.

The cases just cited fully dispose of the appellants' idea, upon which they have so confidently relied, that the doctrine of judicial notice entirely relieved them from the necessity of actually exhibiting and filing with their answer the record in the former case, and likewise relieved them from the necessity of actually presenting that record in this record in this court, and likewise relieved them of the necessity of offering any proof whatever of their alleged defense of *res judicata.*

In Farwell *v.* Great Western Tel. Co., 161 Ill., 522, 594, the bill alleged the existence of a certain written contract, but "no copy of the agreement was attached to that bill" (pp. 592, 593). It was held that it was not sufficiently well pleaded to bring it before the court (p. 593). "It cannot be said that it was pleaded in that bill" (pp. 593–594).

The defense of *res judicata* must be set up by proper averments in the answer, or by a separate plea; otherwise it cannot be relied on in the proof. Galloway *v.* Hamilton, 1 Dana, 576; Ferguson *v.* Miller, 5 Ohio, 459; Arnold *v.* Kyle, 8

Baxt., 319; Jourolmon *v.* Massengill, 85 Tenn., 251; Bank *v.* Beverly, 1 How., 134. The former proceedings must be exhibited, so as to show clearly that they constitute *res judicata.* Jourolmon *v.* Massengill, 86 Tenn., 81; Marvin *v.* Hampton, 18 Fla., 131; Bank *v.* Beverly, 1 How., 134.

Where a former decree is relied on as a bar, a prayer in the answer, that "*the pleadings and proofs* in the former suit may be made a part of this cause," does not present the former record or decree; and though the decree be copied in the transcript on appeal, it will not be regarded in the appellate court.

Galloway *v.* Hamilton, 1 Dana, 576.

Where the bill or answer turns upon certain papers, they must be actually exhibited with the bill or answer, and proved on the hearing. Levy *v.* Arredondo, 12 Pet., 218. A mere reference in a bill to proceedings in another suit in the same court, does not make the same a part of the bill or case, without actually filing the same as exhibits. Anderson *v.* Cecil, 86 Md., 490; Myers *v.* Amey, 21 Md., 306.

An answer in chancery, setting up as a defense the dismissal of a former bill filed by the same complainant, is not sufficient unless the record be exhibited. Bank *v.* Beverly, 1 How., 134 (appeal from Circuit Court, D. C.). "The answer sets up the dismission of a bill filed by the complainants in 1827, against the defendants, for the same relief as is prayed for in the present bill, as a bar thereto; but no record of such case is set out or exhibited, so that, however true the answer may be in fact, it cannot avail in law. In this respect it is not responsive to the bill; it sets up distinct affirmative matter of defense and bar, which the defendant must prove, or it can have no effect for either purpose." Bank *v.* Beverly, 1 How., 134, 151. "If the party desires to prove the facts upon which the decree or sentence is founded, or relies upon the decree or sentence as an estoppel, he must produce the

bill, or libel, and answer, and all other proceedings that made up the record." Droop *v.* Ridenour, 11 App., D. C., 224, 245. And see Bank *v.* White, 8 Pet., 262.

The rule is general that a defense of a former judgment or decree as *res judicata* must exhibit the record in the former suit with the plea or answer, as otherwise the plea or answer presents only a mere conclusion of law. Lee *v.* Keister, 11 Iowa, 480; Western *v.* Virginia, 10 W. Va., 250; Heatherly *v.* Hadley, 2 Ore., 275; Marvin *v.* Hampton, 18 Fla., 131; Lyon *v.* Tallmadge, 14 Johns., 511; Jourolmon *v.* Massengill, 86 Tenn., 81; Ford *v.* Jefferson, 4 Iowa, 566; Campbell *v.* Ayres, 6 Iowa, 339; Findley *v.* Johnson, 84 Ga., 69; Norris *v.* Amos, 15 Ind., 365; Brady *v.* Murphy, 19 Ind., 258; Adkins *v.* Hudson, 19 Ind., 392; Williamson *v.* Foreman, 23 Ind., 540; Ringle *v.* Weston, 23 Ind., 588; State *v.* Thompson, 2 Heisk., 147. A plea of *res judicata* by a former decree of dismissal, set up as a defense by way of confession and avoidance in the answer, a copy of such decree being exhibited with the answer, not being responsive to the bill, must be supported and proved by the exhibition and production of the former record and decree; otherwise such defense amounts to nothing. Dexter *v.* Gordon, 11 App., D. C., 60. Of course, the mere pleadings in a former suit cannot themselves operate an estoppel. Dexter *v.* Gordon, *supra.* "Mere averments of a legal conclusion are not admitted by a demurrer." Gould *v.* Evansville, 91 U. S., 526; Dillon *v.* Barnard, 21 Wall., 430. A prior judgment or decree cannot be used as *res judicata* without proper pleadings and proofs. Third *v.* Stone, 174 U. S., 432; Louisville *v.* Citizens, 174 U. S., 436.

In this case the appellants both failed and refused to exhibit with their plea or answer the record necessary to enable the court below to judge whether the alleged defense of *res judicata* was good or bad. They failed and refused to show the merits of their alleged defense. They at first studiously

avoided answering the merits of the bill, and finally refused to answer, preferring rather to admit expressly and conclusively all of the allegations in the bill than to attempt to deny them (R. 67, 69). They presented nothing to the court below by way of defense except a mere legal conclusion; nor do they present anything more to this court, and not even the same record which the lower court had before it. It certainly is not open to them, in this court, to urge or rely upon any matter whatever which does not actually appear in this very record. Nor will this court, in this or any other case, decide any point or question that was not fairly presented for decision by the court below. Rule V, Sec. 3. Clearly, the question of *res judicata* was neither fairly presented to nor decided by the court below, and could not have been upon the record presented there by the appellants; nor is this question now presented to this court. How was it possible for the court below to have decided whether the alleged defense of *res judicata* was good or bad, when the appellants failed to exhibit the former record—the only thing by which the validity or invalidity of the defense could possibly have been decided? How can this court pass upon it, with a still less complete record before it than existed in the court below?

"As a general rule a former adjudication of a cause cannot be urged for the first time in the appellate court. And this certainly cannot be done when *the facts necessary* to sustain an exception of *res judicata do not appear from the record.* Where a decree in a former suit has been held to be *res judicata* of the controversy, objection to the sufficiency of the former suit as a bar, which objection has not been presented to the trial court, cannot be urged on appeal. Accordingly, the validity or regularity of a former judgment pleaded in bar cannot be questioned for the first time on appeal."

2 Cyc., 668.

It does not clearly appear, as it must, that the former decree of dismissal was on the merits; but even if so, yet those merits are not shown. How, then, can it be judicially determined now whether those merits are identical with the merits of this case? The decree of dismissal might be *res judicata* as to the merits of that suit, and yet not have the slightest effect upon the merits of this. If the appellants wished to contend that the former decree is a bar to this suit, they were bound both to plead and prove such defense specially and specifically; otherwise it amounted to nothing. A former decree of dismissal, even when properly pleaded and proved, may be wholly nullified as a bar by a showing that it was not actually made upon the merits, even though apparently so; and likewise, by showing that the merits of the subsequent suit are substantially different from those decided in the prior case. Even a decision of an appellate court in a particular case, rendered upon a given state of facts, becomes the law of that case only as applicable to those facts; and if, on a new trial—and still more in an entirely new and independent suit with additional parties and new and material allegations—a new state of facts be shown, the lower court is not bound by the decision, but should apply the law applicable to the new and changed state of facts. 3 Cyc., 493, 494. A decree of dismissal, by reason of defective pleading in the bill, does not bar a subsequent suit between the same parties, suing and sued in the same capacities, and founded upon the same cause of action, when well pleaded.

Farwell *v.* Great Western Tel. Co., 161 Ill., 522, 594.

"The rule is well settled that a judgment upon a demurrer by reason of a defective pleading, is not a bar to another action founded upon the *same cause* that is well pleaded, and there is no inexorable rule which requires a plaintiff when his declaration shall be adjudged defective on de-

murrer, *to ask leave to amend*, or as a penalty, to forfeit all future right upon the *same cause of action* not set forth in a defective declaration, even though it was attempted to be well stated—*and the same principle applies to a bill in equity* as in a declaration at law. To cite authorities to sustain that proposition would be a work of supererogation. The matters set up as constituting fraud in this bill, which were not pleaded in the bill in the Bates case, render this case so materially different from the Bates case that the latter cannot be considered as *res judicata* of the matters averred in this bill of complaint."

Farwell *v.* Great Western Tel. Co., *supra*, pp. 594, 595.

If the former record were before us in this case it would appear that the decree of dismissal therein was not on the merits even of that case; that no testimony whatever was taken in it; that the allegations of the bill were fatally defective in attempting to set up good matters for relief, and that the case, under the practice in equity, was to all intents and purposes heard and decided only as upon demurrer to the bill; and it would further appear that the merits of this case, both in substance and form, are radically different, in addition to well pleading certain defectively pleaded matters in the former bill. In Cummings *v.* Baker, 16 App., D. C., 1, this court held that the estoppel of a former decree of dismissal applies only to what was actually decided, but not to what might have been determined under some contingency that did not arise; and further, that a decree of dismissal, absolute in form, was not a decree on the merits so as to bar a subsequent suit between the same parties for the same cause of action. In Anderson *v.* Reid, 14 App., D. C., 54, the decree of dismissal was absolute and with costs. In the subsequent case of Anderson *v.* Reid, 16 App., D. C., 60, that decree was relied upon as *res judicata;* but this court said: "By the dismissal of his bill, has that claim been ren-

dered *res judicata?* We think not. Notwithstanding the fact that the court did express the opinion that he would have *no right on the merits* as shown by the evidence in that case, the actual decision was that the bill would not lie."

In short, if the former record were here, it would at once appear that many material facts in this case were not, and could not possibly have been, decided in the former case, because they were nowhere in that case, and hence were not presented for decision.

While fully prepared to show that the former case constitutes no bar nor defense to this, yet I am entirely at loss to understand how such a showing would be germane to this record. I shall not, therefore, simply because I cannot, upon this record directly discuss the question whether the alleged defense is actually good or bad. I do contend, however, that the answer is fatally defective in form and substance, and does not present the alleged defense of *res judicata* in such manner that it can be considered by the court, for the reasons which I have endeavored to point out in this brief. If the answer was not good, then the exceptions to it were properly sustained, the order and final decree *pro confesso* were properly signed and enrolled, and the final decree appealed from should be affirmed.

It will, of course, be remembered that my contention as to the imperative necessity of the actual exhibition and filing of the record in the former case with the anwer alleging *res judicata,* is especially applicable to this case, for the reason that it appears that the whole of that record was in writing, and that no part of it whatever, nor any matter or thing there involved, rested in parol.

It was indeed very easy for the appellants to have presented that record properly, with their plea and answer; and especially so, as it was nearly all printed in compact form. However, one of the primary vices of the plea and answer was that they failed to exhibit and file it.

The allegations of the plea and answer regarding this court's denial of a motion to modify its decree directing a dismissal, so as to remand with leave to amend the bill, or to make the dismissal without prejudice, etc., are immaterial for two reasons, viz: (1). Because no such proceedings are exhibited and filed in this case, and are not in this record; and (2), because such denial merely followed the doctrine stated in Ambler *v.* Archer, 2 App., D. C., 41, and repeated in Warner *v.* Godfrey, 186 U. S., 365; 30 Wash Law Rep., 502. And see also, *ex parte* Mansfield, 11 App. D. C., 558; Ambler *v.* Archer, 1 App., D. C., 94; Humphreys *v.* Eastlock, 51 Atl. Rep. (N. J.), 775; Shields *v.* Barrow, 17 How., 130, 144 (5 Rose's Notes, 440–451); Grymes *v.* Sanders, 93 U. S., 55. If the former record were here, a fact would appear which would be very persuasive in leading to the conclusion that this court did not intend its decree to be *res judicata* of this suit, namely, that it was expressly conceded by all parties to that case that the appellee was absolutely and at all events entitled to a certain part of the retained monies involved, of which he would be wholly deprived if any such effect should be given to that decree as is contended for by the appellants. In short, if that record were here, it would show that this court merely decided that upon the face of that record the decree below was wrong; but it did not decide that the complainant could not file a new suit and recover; nor that he was not in fact entitled to the moneys; nor did it decide that the appellants (or any one else) were entitled to them. Nothing was before the court for decision except certain matters appearing on the face of the pleadings which were only *constructively* admitted or denied, as no evidence was taken on either side.

AS TO PROOF.

Concededly, the complainant would ultimately have been bound to have proved the allegations of his bill by proper evidence, and would have done so had not the appellants expressly relieved him of this burden. If the *pro confesso* order against them was rightly entered, then, by the rules quoted above, no proof *dehors* the bill itself was necessary, although the court might, in its discretion, have required it. But whether the *pro confesso* order was rightly or wrongly entered is now wholly immaterial, because the appellants themselves have expressly and voluntarily and of their own motion relieved the complainant of any such proof (R. 67), and formally and conclusively admitted of record "each and every of the allegations of the bill not sufficiently denied in the defense they have interposed," etc. (R. 69). As the necessary effect of their plea alone was to admit absolutely all of the allegations of the bill (Clark *v.* Bradley Co., 6 App., D. C., 437), and as neither the plea nor answer denied sufficiently nor at all any allegations whatever of the bill, the above words, "not sufficiently denied in the defense they have interposed," have no effect to cut down the absolute admission made by the preceding words of their paper. "Each and every of the allegations of the bill" must therefore be taken as absolutely and conclusively admitted by the appellants, and proof by the appellee was therefore useless. This is the complainant's position in the matter of proof of his bill.

But how do the appellants stand in this respect? There is no admission by the complainant of the allegations of their plea or answer. They have voluntarily elected to let the case go to final decree without any proof upon their parts. They intended the case to be decided finally upon the record as it then stood, assuming that the doctrine of judicial notice relieved them of any proof whatever, and itself supplied all

the proof required. This assumption has been shown to be fallacious. Upon what other theory is it possible to suppose that they based their motion to dismiss the bill (R. 62, 63)? They did not and do not rely merely upon alleged error in the order sustaining the exceptions to their answers, which, if well founded, could only result here in reversal and remand for further proceedings (*In re* Sandford, 160 U. S., 247) with the right to the complainant to contest the truth of the answer; but they do insist here that a final decree in their favor should be passed, upon the theory that nothing more is required of them in the case, because their alleged defense of *res judicata* is well pleaded and requires no proof whatever—that is, that it proves itself, or is proved by judicial notice alone. Nothing can be clearer than that, upon this theory of theirs, the decree should be affirmed, even conceding that their alleged defense is well pleaded; because without proof it amounts to nothing. Dexter *v.* Gordon, 11 App., D. C., 60.

The appellants will concede that they purposely put the court below in such a position that it could do nothing but what it did do. They intended their course of procedure to have the effect which it did have, and even went so far as to move the court below to pass a final decree (R. 69) at a time when they themselves had made it impossible for the court to pass then any final decree except against them; and even before they filed this motion, they were actively working to the same end (R. 67). All these things they did upon the assumption that no proof was or could be required of them, and that the case was ripe for a final decree which would end it, and not merely cause a remand for further proceedings if reversed on appeal. Affirmance of this decree will end this case; but reversal will only result in further proceedings, if the reversal should be upon any grounds relied upon by the appellants in the court below, and decided by that court, as required by Rule V, Sec. 3, of this court.

I desire to record my solemn protest in this court, as I have

in the court below, against the unjust and improper language often used by one of the appellants in this record, relating to the appellee and myself personally, and having no relation whatever to the merits of the case. With this protest against such use—or abuse—of the records of the court, I can well afford to ignore further the objectionable language which has been employed.

The greater part of this record is plainly unnecessary and utterly immaterial, and in any event its cost should be charged to the appellants under the rules of this court.

CONCLUSION.

In conclusion, the appellee respectfully submits that the decree appealed from should be affirmed with costs.

THOMAS M. FIELDS,
Solicitor for Appellee.

WASHINGTON, D. C., *June*, 1903.

No. 1310.

ELLWOOD O. WAGENHURST, et al., Appellants,

vs.

ELIAS WINELAND, Appellee.

Motions to Dismiss or Affirm, and Brief for Appellee.

THOMAS M. FIELDS,
Solicitor for Appellee.

WASHINGTON MONOTYPE PRINTING CO.
1903.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1903.

ELLWOOD O. WAGENHURST ET AL., *Appellants,*
v.
ELIAS WINELAND, *Appellee.*
No. 1310.

MOTIONS TO DISMISS OR AFFIRM.

Comes here now the appellee, Elias Wineland, by Mr. Thomas M. Fields, his solicitor, and moves the court as follows:

1. To dismiss this appeal for want of jurisdiction for the reasons following:

A. Because this appeal is from a mere *pro confesso* decree.

B. Because this appeal is from a consent decree.

C. Because this appeal is by only three of five defendants to a joint decree and without summons or severance or equivalent proceedings.

2. To affirm the decree appealed from on the ground that, although the record may show that this court has jurisdiction of the case, it is clear that the question on which the juris-

diction and right of review depends is so manifestly frivolous as not to require further argument.

THOMAS M. FIELDS,
Solicitor for Appellee.

NOTICE TO APPELLANTS.

The appellants and each of them will take notice that the foregoing motions will be called to the attention of the court on Tuesday, May 19, 1903, at ten (10) o'clock A. M., or as soon thereafter as counsel can be heard.

THOMAS M. FIELDS,
Solicitor for Appellee.

Service of copies of the above motions and notice is acknowledged hereby this 7th day of May, 1903.

J. ALTHEUS JOHNSON,
Solicitor for Appellants.

POINTS DECIDED.

The court below decided that as the appellants had expressly relieved the appellee "of proof touching any matter or thing set forth in the bill" (R. 67) and "formally admitted on the record herein each and every of the allegations of the bill" (R. 69), and "wishing to put the record in such shape that the court, as to them, may make at once a final order or decree in the premises" against them (R. 67), and having moved "the court to make an order or decree in the premises (against them) which will end this cause and be a final determination thereof (against them) so far as the same concerns or affects the complainant (appellee) and these defendants (appellants)," and having made default under the rules of the court below and the order of March 20, 1903

(R. 66), and the allegations of the bill being sufficient to justify the relief asked, and the appellants having refused to avail themselves of their rights to answer over under the said order of March 20, 1903 (R. 66, 70), and having offered no evidence to support their alleged defense, which was non-responsive to the bill but affirmative in its nature, and the burden of proof of which was upon them, but having waived any right to offer any such evidence, the appellee was entitled to the decree passed, upon the matters and things then shown by the record and proceedings in the case. Other questions were previously decided adversely to the appellants, but they took no appeals from any such decisions, nor did they pray for any such appeals, and hence such decisions are not involved in nor presented by this appeal from the *pro confesso* decree.

Babbington *v.* Washington Brewery Co., 13 App. D. C., 527, 532, 533.

BRIEF OF POINTS AND AUTHORITIES FOR APPELLEE.

I.

MOTION TO DISMISS.

A. The decree appealed from is a mere decree *pro confesso* (R. 70–71). No appeal lies from such a decree. "The decree which follows a bill taken *pro confesso* (see Record, 68, 70) in chancery corresponds to a judgment by default, or *nil dicit*, in a court of law, and from it no appeal lies, such decree being considered as binding and as conclusive as any decree rendered in the most solemn manner, concluding the defendant so far at least as the decree is supported by the allegations of the bill, taking the same to be true." 2 Cyc. 619, and cases cited. No appeal or writ of error lies

from a judgment by default at law. 2 Cyc. 617, 618, and many cases cited. But upon appeal from *subsequent* decrees, as decrees confirming sales, overruling or sustaining exceptions to a master's report, etc., the appellant may contest the sufficiency of the bill to support the decree *pro confesso*, but he cannot question the want of testimony or the insufficiency or amount thereof. 2 Cyc. 619. Thompson *v.* Wooster, 114 U. S. 104; Central R.R. Co. *v.* Central Trust Co., 133 U. S. 83; Masterson *v.* Howard, 18 Wall. 99. The decree *pro confesso* in Thompson *v.* Wooster, *supra*, was reviewed upon appeal from a *subsequent* decree in the case; and likewise in Dobson *v.* Hartford, 114 U. S. 439. In Bank *v.* White, 8 Pet. 262, the appeal was from a decree upon a bill of review to vacate a decree *pro confesso*. In Central R.R. Co. *v.* Central Trust Co., *supra*, the *pro confesso* decree for sale was reviewed upon appeal from a *subsequent* deficiency decree, in a foreclosure suit.

An appeal in chancery proceedings cannot be taken from a final decree rendered upon an order *pro confesso*. Betton *v.* Williams, 4 Fla. 11 (1851); Megin *v.* Filor, 4 Fla. 203 (1851); *In re* Ringgold, 1 Bland 5 (1824); Kane *v.* Whittick, 8 Wend. 219 (1831); Murphy *v.* American Life Ins. & Tr. Co., 25 Wend. 249 (1840); Baker *v.* Western, 6 W. Va. 196 (1873). If a defendant voluntarily absents himself from the hearing before the Chancellor, he cannot appeal from a decree rendered in his absence. Townsend *v.* Smith, 12 N. J. Eq. 350 (1858), 72 Am. Dec. 403. Where a bill was heard on notice, a party not appearing cannot appeal from a decree made in his absence. Barber *v.* West, 52 N. J. Eq. 287 (1894), 29 Atl. Rep. 486. After answer had been filed and replied to, and the cause had been regularly set down for hearing, the defendant failed to appear at the hearing, whereupon a decree was pronounced against him. The court held that such decree was not subject to appeal. Sands *v.* Hildreth, 12 Johns. 493 (1815). A defendant in chancery, in a bill to foreclose a mortgage, who

suffers the bill to be taken *pro confesso*, and permits a decree for sale to be made without opposition, cannot prosecute an appeal therefrom. Murphy *v.* American Life Ins. & Tr. Co., 25 Wend. 249 (1840). In Hart *v.* Strong, 15 Vt. 377 (1843), it was held that where a defendant *neglected to answer the bill agreeably to the rules of the court*, and it was *on that account* taken *pro confesso*, and a decree made thereon, the decree was not appealable, although the defendant had appeared. And in Baker *v.* Western, 6 W. Va. 196 (1873), the court holds that if a party takes an appeal from a decree by default, his appeal must be dismissed as being improperly taken.

The authorities upon this point could be multiplied, and carried down to this date, but the principle is so well established, and so reasonable in itself, that further citations would be a work of supererogation.

In the case at bar, the appeal is solely and directly from the *pro confesso* decree itself, which is not appealable, and hence the appeal should be dismissed.

B. Practically the decree appealed from was consented to by the appellants, because they desired such a decree (R. 67), and even went so far as to move the court below to pass such a decree (R. 69). Their motion was denied (R. 69) because the record was not then in shape for a final decree against *all* of the defendants. A consent decree is not in general appealable. It plainly appears that the appellants agreed in fact that a final decree against them should be passed. Practically, the decree was rendered upon a case stated or submitted for the opinion of the court, where no right of appeal was reserved (Rec. 67, 69), and hence no appeal lies. 2 Cyc. 622. While, under the statute, the Supreme Court is required to entertain appeals from consent decrees, yet the only question which can be considered upon such appeals is whether the court below had *jurisdiction* to pass the decree. If such jurisdiction be found to exist, the decree will be affirmed without more. R.R. Co. *v.* Ketchum, 101 U. S. 289. In

U. S. *v.* Babitt, 104 U. S. 767, the Court of Claims decided against Babitt, "but the record shows that after the decision was announced a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. *This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal.* In R.R. Co. *v.* Ketchum, 101 U. S. 289, we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were *in law* waived by such a consent. In our opinion this case comes within that rule. The consent to the judgment below was, *in law*, a waiver of the error now complained of. For this reason the judgment must be affirmed." Per Mr. Chief Justice Waite.

This court is not required by any law to entertain appeals from consent decrees, which are not in general appealable. The appellants actively sought a final decree at a time when no decree but one against them was possible; and it is beyond question that the decree which they sought by their papers (R. 67, 69) was one against them, and such as was soon thereafter passed, and which is now here on their appeal from it. As in law, if not indeed in fact, they consented to this decree, and waived any errors in it, this appeal should be dismissed.

C. The decree appealed from is joint against five defendants, of whom the appellants are three. They have taken this appeal without summons or severance or equivalent proceedings. The order allowing their appeal (R. 72) cannot avail them in this respect, because the prior proceedings absolutely necessary to give effect to such an order were wholly wanting. All parties to a joint decree must join in an appeal therefrom, unless there be summons or notice in writing to the others, and severance, which the record must show.

Masterson *v.* Howard, 10 Wall. 416.

Hardee *v.* Wilson, 146 U. S. 179.

Inglehart *v.* Stansbury, 151 U. S. 68.
Davis *v.* Mercantile, 152 U. S. 590.
Sipperley *v.* Smith, 155 U. S. 86.
Beardsley *v.* Arkansas, 158 U. S. 123.
Wilson *v.* Kiesel, 164 U. S. 248.

"It is settled, for reasons too obvious to need repetition, that in equity causes all parties against whom a joint decree is rendered must join in an appeal, if any be taken; but this appeal was taken by John D. Beardsley alone, *and there is nothing in the record to show that his co-defendants were applied to and refused to appeal,* nor was any order entered by the court, *on notice,* granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained. Hardee *v.* Wilson, 146 U. S. 179. Davis *v.* Mercantile T. Co., 152 U. S. 590."

Beardsley *v.* Arkansas, 158 U. S. 123, *per* Mr. Ch. J. Fuller.
Owings *v.* Kincannon, 7 Pet. 399.
Massina *v.* Cavazos, 6 Wall. 355.

In Hardee *v.* Wilson, 146 U. S. 179, Mr. Justice Shiras fully reviews the authorities regarding appeals in equity from joint decrees, and, among other things, says: "We should have held this appeal good if it had appeared in any way *by the record* that Maverick *had been notified in writing to appear,* and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of the appellant, does not prove this. We think there should be a *written notice and due service,* or the *record* should show his appearance and refusal, and that the court *on that ground* granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, it would enable the court

below to execute its decree so far as it could be executed on the party who refused to join, and it would estop the party from bringing another appeal for the same matter."

The court further holds, citing to this point Mason *v.* U. S., 136 U. S. 581; that the appellate court will not permit the record to be amended by adding the omitted parties as appellants, nor by granting a severance of the parties, even with the consent of the omitted parties.

In Cruit *v.* Owen, 31 Wash. Law Rep., 222, 225, this court said:

"Ann E. J. Cruit alone has appealed from the judgment entered on the verdict.

"1. A preliminary question arises on the motion of the appellee to dismiss the appeal, on the ground that appellant has appealed alone *without summons* to the other caveatees and severance upon their refusal to join in the appeal.

"The general rule of practice is well settled, that where there are two or more parties to a judgment who have a joint or dependent interest in the subject-matter thereof, they must join in the writ of error (or appeal under our statute); or else, one who alone would appeal *must summon the others* and obtain a severance from those *who refuse.* Godfrey *v.* Roessle, 5 App. D. C. 299, 300; 23 Wash. Law Reporter, 129; Slater *v.* Hamacher, 15 App. D. C. 294, 298; 27 Wash. Law Rep. 671.

* * * * * *

"The proceeding (caveat to will) from institution to final judgment is essentially different from the ordinary actions *in personam,* against two or more defendants, the objects of which are *to recover money, or property,* or to compel the performance of some act involving a right of property as between the parties to the suit."

All of the cases concur in holding that *written notice* to the omitted parties is necessary, and that they shall have refused to join in the appeal; and that any order of severance

must be based "on that ground;" and also that *the record must show these matters.*

Here a joint decree was rendered against five defendants, but only three have appealed. There was not the slightest effort made by these three appellants or any one of them to notify their co-defendants to join in the appeal; there was no notice to them in writing or otherwise; they had no opportunity to join or to refuse to join; they neither joined nor refused to join; the order allowing the appeal did not operate a severance; but even if so, yet it cannot be considered effective by this court because its necessary basis was and is wholly wanting; and this record is entirely silent as to the proceedings imperatively required to allow these appellants alone to prosecute this appeal. Hence this appeal ought to be dismissed.

II.

MOTION TO AFFIRM.

Conceding, now, for the purpose of the argument, that this court has jurisdiction of this appeal from the *pro confesso* or default decree, what can be considered on appeal when a *pro confesso* decree comes under review? The answer is so certain that, when applied to this case, it would be manifestly frivolous to argue further the only question which is open for argument. The leading case upon this subject is that of Thompson *v.* Wooster, 114 U. S. 104. In that case a *pro confesso* decree was entered for the complainant, and the cause was referred to a master to state an account of damages for the infringement of a patent. The master took proofs and duly reported to the court. The defendant excepted to this report, but his exceptions were overruled, and a decree was thereupon entered in favor of the complainant for the amount of damages reported by the master. From

this decree—not the *pro confesso* decree—the defendant appealed. Five of the errors assigned on the appeal related to the *pro confesso* decree, while the others referred to the master's report. The court, per Mr. Justice Bradley, elaborately reviewed the principles and practice of *pro confesso* decrees, and reached the following conclusions:

1. A decree *pro confesso* should be made according to what is proper to be decreed upon the statements of the bill, *assumed to be true.*

2. Where a decree is taken *pro confesso,* the allegations of the bill cannot be questioned in subsequent proceedings in the court below *or upon appeal,* except for errors apparent on the face of the bill; *but facts not found in the allegations of the bill are inadmissible to affect the decree.*

3. Evidence questioning the validity of a patent declared to be valid by a *pro confesso* decree, is *inadmissible* in proceedings before a master *or on appeal,* after a decree *pro confesso* has been taken on a bill for infringement and account.

4. Even if the bill shows a strong presumption of unreasonable delay by complainant, yet if this might *possibly* have been explained, the *pro confesso* decree must stand.

5. *Affidavits presented to the court below,* as grounds for applications to reopen the proofs, *cannot be considered on appeal.*

The decree appealed from was affirmed. The appellee to point 2 cited—

Kane *v.* Wittick, 8 Wend. 219.
Sands *v.* Hildreth, 12 Johns. 493.
Henry *v.* Cuyler, 17 Johns. 469.
Colden *v.* Knickerbocker, 2 Cow. 31.
R.R. Co. *v.* Ketchum, 101 U. S. 289.

To the point that an appeal will not lie from a *pro confesso* decree, the appellee cited—

Murphy *v.* Ins. Co., 25 Wend. 249.

Hart *v.* Strong, 15 Vt. 377.

In various parts of the opinion, the court said:

"Our rules *do not require the cause to be set down for hearing* at a regular term.

* * * * * *

"From the authorities cited, and the express language of our own Rules in Equity, it seems clear that the defendants, after the entry of the decree *pro confesso*, and whilst it stood unrevoked, *were absolutely barred and precluded from alleging anything in derogation of, or in opposition to, the said decree*, and that they *are equally barred and precluded from questioning its correctness here on appeal*, unless on the *face of the bill* it appears manifest that it was erroneous and improperly granted. * * * On *this appeal* it is surely irregular to question the allegations of the bill. If anything appears *in those allegations themselves* going to show that the decree was erroneous, of course it is assignable for error; *but any attempt to introduce facts not embraced in those allegations, for the purpose of countervailing the decree, is manifestly improper.* The introduction of the original patent, pending the appeal, was clearly irregular.

* * * * * *

"We have been the more particular in examining this subject because of the attempt made by the defendants, *on this appeal, to overthrow the decree by* MATTERS OUTSIDE OF THE BILL, which was regularly taken *pro confesso.*"

Thompson *v.* Wooster , 114 U. S. 104, was followed in—

Dobson *v.* Hartford, 114 U. S. 446, holding *pro confesso* decree conclusive of validity of patent, in suit for infringement; in Hefner *v.* Northwestern, 123 U. S. 756, holding party defaulting concluded by *pro confesso* decree of foreclosure; Sheffield *v.* Witherow, 149 U. S. 576, sustaining decree *pro confesso* after filing of demurrer which was fatally defective;

in Wooster *v.* Thornton, 26 Fed. 275, holding interlocutory decree *pro confesso*, declaring reissue valid, conclusive; in Austin *v.* Riley, 55 Fed. 836, 837, denying motion to set aside default decree in foreclosure; in Southern *v.* Temple, 59 Fed. 18, holding decree *pro confesso* conclusive; in Schofield *v.* Horse, 65 Fed. 436, holding showing did not warrant court in setting aside decree *pro confesso;* Price *v.* Boden, 39 Fla. 222, holding defendants not entitled to notice of proceedings after default; and in Clark *v.* Wooster, 119 U. S. 323, sustaining reissue involved in principal case, where there was no evidence of expanded claim.

In Dobson *v.* Hartford, 114 U. S. 439, a suit for infringement and account, the bill was taken for confessed for failure to "plead, answer or demur" after "defendants appeared by a solicitor"; and thereafter a decree *pro confesso* was entered, awarding complainant a perpetual injunction and an account of profits and damages. The account was taken and stated by a master, who duly reported. Defendants filed exceptions to this report, but they were overruled, and a decree for the damages and profits was entered for complainant. Defendants appealed from *this decree.* The court said:

" * * * Though the bill was taken as confessed, the defendants take the point that the *patent* is void on its face. * * * Even if the defendants can raise this point after a decree *pro confesso* (see Thompson *v.* Wooster, 114 U. S. 104), *the patent must be held valid at least for the purposes of this cause.*"

It is not necessary to serve a copy of the *pro confesso* order before the final decree be made.

Bank *v.* White, 8 Peters, 262.

Upon a final decree *pro confesso*, based upon a prior order *pro confesso*, the *only question on appeal* that can be made against it is that it is shown to be *erroneous by statements in*

the bill itself, as those statements are assumed to be true, and the decree is as binding and conclusive as any decree rendered in the most solemn manner. It cannot be impeached collaterally except by bill of review or bill to set it aside for fraud.

Thompson *v.* Wooster, 114 U. S. 104, 111, 113.
Bank *v.* White, 8 Peters, 262.

Where a decree is entered upon an order taking a bill in equity as confessed by the defendants for *want of an answer which complies with the rules or terms prescribed by an order*, the *only question on appeal* is whether the allegations of the bill are sufficient to support the decree.

Masterson *v.* Howard, 18 Wall. 99, per Mr. Justice Field.

The defendants are not entitled to any notice of the application for a final decree *pro confesso*.

1 Bates Fed. Eq. Pr. Sec. 167, and cases cited.

"Facts not found in the allegations of the bill are inadmissible to affect the decree *on appeal*."

1 Bates Fed. Eq. Pr. Sec. 171.
Thompson *v.* Wooster, 114 U. S. 104.

In Bank *v.* White, 8 Peters, 262, the court, per Mr. Justice Story, said:

"In the present case the circuit court did proceed to make a final decree, after taking the bill *pro confesso*. There is no error *on the face of that decree*. It conforms to the requisitions of the *rules* of this court; and we are, therefore, of opinion that it is not liable to reversal upon the present bill of review."

The court further expressly holds that if the court passes an order out of favor or discretion, and subsequently ignores it, this is mere irregularity, to be redressed, if at all, by the court below, while it retains possession and power over the case, and is no ground for reversal or appeal.

The opinion clearly shows that on an appeal which brings under review a decree *pro confesso* the *only question on the appeal* is whether there is any error *on the face of the record*—that is, whether the bill supports the decree.

In Masterson *v.* Howard, 18 Wall. 99, a *pro confesso* order was taken because the answer filed did not comply with the terms of an order allowing it to be filed. This order *pro confesso* was subsequently confirmed and made final. The direct holding of the Supreme Court as to the only question on an appeal which presented a final decree *pro confesso*, based upon such prior *pro confesso* order, was as hereinbefore stated.

A *pro confesso* decree is to conform to the bill and is to be according to the statements of the bill, *assumed to be true.* If these statements be distinct and positive, no proof is required, and they are to be taken as true without proof. But whether proof be taken or not, the defendant, *on appeal*, cannot question the want of testimony or amount of the evidence, *but can only contest the sufficiency of the averments of the bill to support the decree.*

Central *v.* Central, 133 U. S. 83.

In the case of *In re* Sanford, 160 U. S. 247, the court held that the complainant, upon the coming in of the answer, may (1) amend his bill, or (2) except to the answer for in sufficiency, or (3) file the general replication, if the answer be not excepted to or be held sufficient, or (4) set down the cause for hearing on bill and answer. If the answer be excepted to, and the defendant does not submit to the exceptions, they may be set down for hearing; and if, upon hearing, they be allowed, then the defendant "must put in a full and complete answer, *otherwise the plaintiff may take the bill*, so far as the matter of exceptions is concerned, *as confessed.*"

Equity Rule 55 of the court below provides for exceptions to answers for insufficiency. Equity Rule 58 provides that

if exceptions to an answer be allowed, the "defendant shall put in a full and complete answer within ten days, exclusive of Sundays; *otherwise the plaintiff shall, as of course, be entitled to take the bill*, so far as the matter of such exceptions is concerned, *as confessed*," etc.

Equity Rule 54 provides that "the answer after the introductory part of it, shall be divided into paragraphs in the same manner as the bill, and each paragraph in the answer shall correspond with the paragraph in the bill of the same number."

The appellants' various proceedings in this case nearly always directly violated or wholly disregarded some one or more of the rules of the court below. Several rules other than those above mentioned, and especially Equity Rules 28 and 29, played important parts at various stages of the cause, on account of their violation or disregard by the appellants. The rules of the court below are, as a matter of course, the law of that court. These rules follow closely the Federal Equity Rules in their provisions.

Bank *v.* White, 8 Pet. 262, was a *bill of review* to vacate a final decree *pro confesso*. The decree was vacated by the lower court upon this bill of review. The appeal was from *this decree*, and it was reversed.

Per Mr. Justice Story.

Masterson *v.* Howard, 18 Wall. 99, was an appeal which presented a final decree *pro confesso*. The court said: "The *only question*, therefore, upon the record is, whether the allegations of the supplemental bill, and of the original bill to which it refers, are sufficient to support the decree thus entered upon the default of the defendants (one for not answering at all, and the other for not answering in compliance with an order of court allowing him to answer, under which he filed an answer). And upon this question there can be no doubt."

Per Mr. Justice Field.

Hefner *v.* Northwestern Mutual Life Ins. Co., 123 U. S. 747, was a writ of error on a judgment in ejectment for plaintiff below. Plaintiff made title through a final foreclosure decree *pro confesso*. This decree was sought to be impeached collaterally in the ejectment case. The court said: "Callanan, by the service of the subpœna, had due notice of the allegations and prayer of the bill. By the decree reciting and confirming his default, the bill was taken for confessed against him; and any final decree warranted by the allegations of the bill bound him to the same extent as if he had appeared in the suit, and demurred to or contested those allegations. Thompson *v.* Wooster, 114 U. S. 104. * * * That decree is a conclusive adjudication, which cannot be collaterally impeached by Callanan or those claiming under him. * * *"

Per Mr. Justice Gray.

Ohio Central R.R. Co. *v.* Central Trust Co., 133 U. S. 83, was an appeal from a deficiency decree in foreclosure. Defendants appeared, but failed to plead, answer or demur. Order *pro confesso* was taken, and thereafter a *pro confesso* decree for sale was entered. Sale was made. The appeal was from the subsequent deficiency decree, and not from the decree for sale. The court quotes from Thompson *v.* Wooster, 114 U. S. 104, and holds that *on appeal*, the defendant can contest *only* the sufficiency of the bill, or that its averments do not justify the decree, or that the decree is not confined to the matter of the bill.

Per Mr. Chief Justice Fuller.

Sheffield *v.* Witherow, 149 U. S. 574, was an appeal which presented a final decree *pro confesso*. This final decree was based upon a prior order *pro confesso* which was entered because a demurrer, fatally defective as to certificate and affidavit, was considered and treated by the court as a mere nullity. The decree was affirmed.

Per Mr. Justice Brewer.

Applying to this case the principles established by the foregoing authorities, and considering the only question open on this appeal, it is too plain for further argument that the bill fully supports the decree, and that "there is no error on the face of that decree." The appellants are not at liberty to urge anything against the decree except insufficiency of the bill to support it, or error on the face of the decree itself. Their own voluntary course of procedure in this case has placed them in this situation.

If the matter of *res judicata* alleged by the appellants shall ever be reached again, it will be found to have no real application to this suit, in view of all the authorities upon the doctrine, and the radical differences between this suit and a former one.

For the resons stated above the decree appealed from should be affirmed, if this appeal be not dismissed for want of jurisdiction.

"The trustees did not appeal, and the time has long since elapsed within which they could appeal. It was therefore justly assumed that they were content to abide by the decree of the court below."

May *v.* Bryan, 17 App. D. C. 392, 394.

Here, the Treasurer, Mr. Roberts, has not appealed. He is a mere *trustee* for the complainant, the owner of the fund. The public authorities have no further rights or interests in it, as all of their claims and the conditions of retention have been fully satisfied, and the periods of retention have expired—indeed by very nearly one year as to Contract 2361. The decree has not been superseded, and there is nothing to prevent its immediate execution as against Mr. Roberts. If it should be reversed, such reversal would only be as to and in favor of the appellants, but not Roberts nor Moore.

It may be justly assumed that Roberts, who holds the

moneys, is content to abide by the decree, from the facts that he has not appealed from it and the time for appeal has passed.

By far the greater part of the record, which the appellants have brought into this court, is totally unnecessary, and much of it is improper.

CONCLUSION.

It is respectfully submitted (1) that this appeal should be dismissed for want of jurisdiction or (2) that the decree appealed from should be affirmed without further argument.

THOMAS M. FIELDS,
Solicitor for Appellee.

WASHINGTON, D. C., *May* 7, 1903.

CLERK

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1903.

No. 1310.

ELLWOOD O. WAGENHURST *et al.*

vs.

ELIAS WINELAND.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
For the Appellants.

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vs.

ELIAS WINELAND.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The decree from which the appeal herein is taken declares Elias Wineland to be "the sole and absolute owner in his own right, subject only to the conditions of retention, of the whole and all of the moneys, bonds, and interest arising and retained under contracts Nos. 2361 and 2390 between the respondents, Robert M. Moore and Ellwood O. Wagenhurst, as co-partners trading under the firm name of R. M. Moore & Co., and the District of Columbia, which said retained moneys, bonds, and interest are now, and before December 21, A. D. 1898, were, and ever since have been, in the hands of the defendant, Ellis H. Roberts, Treasurer of the United States of America and ex officio commissioner of the sinking fund of the District of Columbia, and which are fully described in the bill of complaint and exhibits herein." (Printed record, p. 71.) The decree also declares that the respondents, Ellwood O. Wagenhurst, John E. Reyburn and John K. Little "have not any valid right, title, interest, estate, claim,

or demand whatever in or to the said retained moneys, bonds, and interest, or any part thereof, *as against the complainant*" (the said Wineland), and it perpetually enjoins and restrains the said Wagenhurst, Rayburn and Little "from interfering or intermeddling in any manner whatsoever with the said retained moneys, bonds, and interest, or any part thereof, and likewise from collecting or receiving the same, or any part thereof." (Printed record, p. 71.) This decree was made on the 7th day of April, 1903, in Equity cause No. 23352, in the Supreme Court of the District of Columbia.

This court, taking judicial notice of its own records and proceedings, will see, by referring to cause No. 1154 on the docket of this court, that the identical court from whose decree the present appeal is prosecuted made a decree on the 15th day of November, 1901, in Equity cause No. 21698, wherein it declared, in words identical with the ones used in the present decree, that Elias Wineland was the sole and absolute owner of the moneys, bonds, and interest above mentioned; that Wagenhurst, Reyburn and Little had not any right, title, or interest in them as against the complainant (the said Wineland) and perpetually enjoining the said Wagenhurst, Rayburn and Little from interfering and intermeddling in any manner whatsoever with the said moneys, bonds, and interest, or any part thereof, and likewise from collecting or receiving the same, or any part thereof. (See page 55 of the printed transcript of record in cause No. 1154 of this court.) In that cause, Equity No. 21698 in the Supreme Court of the District of Columbia, Elias Wineland, the present appellee, was the party complainant, and Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, the present appellants, were parties defendant. This court in that cause (No. 1154 in this court), as will be seen from the record and proceedings of this court had in the said cause, reversed the decree which had been made by the Supreme Court of the District of Columbia, which had adjudged Wineland to be

the owner as against these appellants of the moneys, bonds, and interest aforesaid, and directed the said Supreme Court of the District of Columbia to dismiss Wineland's bill of complaint. Pending the issuance of the mandate from this court in that cause, Elias Wineland, by his solicitor, as the records of this court show, made a motion for a modification of the decree of this court, asking that he might go back with leave to amend his bill in the lower court, or else that the dismissal might be declared to be "without prejudice." That motion to modify was supported by elaborate affidavits and an elaborate brief filed in this court in behalf thereof, but the said motion to modify was by this court overruled and the mandate went down reversing the decree of the lower court and directing an absolute dismissal of Wineland's bill of complaint against these appellants, Wagenhurst, Reyburn and Little. At page 51 of the printed record in the present cause (No. 1310 of this court) will be found the final decree entered by the Supreme Court of the District of Columbia in Equity cause No. 21698, in accordance with the mandate which went down from this court.

On the very day the mandate from this court in No. 1154, directing a dismissal of equity cause No. 21698 was filed in the lower court, Elias Wineland, who had been the complainant against these appellants in that cause, filed his present suit, Equity cause No. 23352, in the Supreme Court of the District of Columbia, now cause No. 1310 on the docket of this court. To the bill so exhibited against them these appellants filed their plea in bar thereof, setting up the former adjudication, which had been had in the same court, between the same parties, concerning the same subject-matter, and in which the same relief had been sought as was now sought in this second suit. Their plea so filed is to be found at page 36 of the printed record in this cause, No. 1310. When the plea thus filed came up for hearing the justice before whom it came, seeing that it was not accompanied with a supporting answer

which he thought should have been made in the matter, at once, without looking into the merits of the defense set up in the plea, overruled the plea and directed the defendants to answer. (P. 46 of the printed record.) The defendants, Wagenhurst, Reyburn and Little, thereupon put in an answer, wherein they set out that the whole matter of the bill and the relief thereunder prayed was *res judicata* as between the parties to this proceeding and insisted upon the former adjudication as a defense in bar of the present bill. Their answer so made is found at page 47 of the printed record. To their answer thus made exceptions were filed and when the matter came on for hearing upon the exceptions the justice before whom the hearing was had, seeing that the bill of complaint was divided into some forty-odd separately numbered paragraphs, and that the answer contained but two paragraphs with numbering responsive to that in the bill, and that it proceeded, without further responsive numbering of paragraphs, to set up the bar of a former adjudication as a defense "to the allegations contained in each and every of the remaining paragraphs of the said bill," at once, without considering at all the matter so alleged as a defense to "each and every of the remaining paragraphs of the bill," sustained the exceptions, and ordered the defendants to put in a sufficient answer. The order thus made, sustaining exceptions to the answer, is found on page 66 of the printed record.

At the point in the case where they had been directed to put in another answer these appellants had three times, in a legal and proper manner, as they believed, set up in this cause the former adjudication in their favor, made under the direction of this court, and sought the benefit thereof against further litigation, namely, they had set it up, first, in response to a rule issued against them on the filing of this suit in the lower court to show cause why they should not be enjoined, *pendente lite*, from collecting or receiving the moneys from the Treasury Department, and why a receiver of the said moneys

should not be appointed. That rule to show cause is found on page 30 of the printed record, and the response of these appellants thereto on pages 31 to 35. They had set it up again in their plea, found at pages 36 to 39 of the record, and again in their answer, found on pages 47 to 52 of the printed record.

These appellants, believing that the subject-matter of this suit, and the relief prayed by Wineland with reference thereto, had been, as between them and Wineland, fully, finally, and meritoriously determined in the former suit, Equity No. 21698, and believing that they had sufficiently put before the court in this cause their defense of *res judicata*, based upon the records of the court in which the defense was made, were solicitous that the court should make a final decree in the matter, and, with a view to hastening that end, they put themselves on record, the day they were directed to answer further, by filing the following paper, page 67 of the printed record: "And the said Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, not desiring to make other or further answer herein, but wishing to put the record in such shape that the court, as to them, may make at once a final order or decree in the premises, do declare their willingness to stand by the record as it now exists, thus relieving the complainant of proof touching any matter or thing set forth in the bill not sufficiently denied by the defense herein." The appellants believe that "their defense herein," first by plea, then by answer, constitutes a sufficient denial of every material matter or thing set forth in the bill so far as the relief prayed is concerned.

These appellants assumed the attitude they did because they did not believe that the decision of this court in No. 1154 would be to them like apples of Sodom, fair to the eye but ashes to the taste. This court, in its written opinion filed in that cause, said, "It is very clear that Moore (through whom Wineland claims title) had no greater authority over the

affairs of the dissolved partnership than his copartner, Wagenhurst, had. And both the partners having disposed of all their rights and interests in the retained repair fund, it would seem to be clear that Moore had no further power or authority to make the subsequent assignment to the complainant, Wineland, and that the latter could take no right or title by that assignment, to defeat the just rights and claims of the prior assignees, claiming by virtue of assignments of both the partners. The rights of both partners were extinguished in the funds attempted to be assigned, and were no longer subjects of assignments, under pretense of settling partnership affairs." (20 D. C. App., 95.)

These appellants followed up their waiver of further pleading, mentioned above and found on page 67 of the printed record, by a motion for a final decree. This motion, found at page 69 of the printed record, is in the following words: "Come now the defendants Ellwood O. Wagenhurst, John E. Reyburn and John K. Little, by their solicitors, and showing to the court that their pleading herein has ended and that they have formally admitted on the record herein each and every of the allegations of the bill not sufficiently denied in the defense they have interposed (as shown by their statement filed herein on the 20th day of March, A. D., 1903), they move the court to make an order or decree in the premises which will end this cause and be a final determination thereof so far as the same concerns or affects the complainant and these defendants." An order or decree entered on this motion could not be a consent decree or a decree from which these appellants, if dissatisfied therewith, could not appeal. Their attitude and feeling in the matter, as induced by the course of the other side, and their desire to have speedy action in the cause, are apparent in motions and affidavits to be found in various parts of the record; one of them, made by these appellants—a motion to dismiss the bill of complaint and the accompanying affidavit—is to be found at pages 62 to 64 of the

printed record. This motion to dismiss, found at page 62 of the printed record, was by the court overruled, as seen by the order on page 68 of the printed record, and the motion for a final order or decree above mentioned, found on page 69 of the printed record, made by these appellants, was also overruled.

Their plea to the bill of complaint was filed July 28, 1902, and, without looking to the merits thereof, the said plea was overruled January 15, 1902. Their answer was filed January 23, 1903, and, without looking to the merits of the defense set up therein, was held insufficient March 29, 1903. The motion to dismiss, made by these appellants on March 11, 1903 (p. 62, Rec.), was overruled on March 24, 1903 (p. 68, Rec.). The motion made by them March 24, 1903, for a final decree (p. 69, Rec.), was overruled March 31, 1903 (ditto).

The record standing as above indicated, the court below, on April 3, 1903, passed against these appellants what it called a "*pro confesso*" as seen on page 70 of the record. This so-called *pro confesso* was followed on April 7, 1903, with the decree from which this appeal is taken. To describe the appellants as in default in their defense herein and to characterize the decree against them as a *pro confesso* is a misnomer, and to speak of their appeal from the final decree herein entered in the lower court as "manifestly frivolous" is an abuse of words.

The garbled extracts contained in the motion to dismiss or affirm, quoted to show a decree "*pro confesso*" and a decree by "consent," are by no means representative of the record. These appellants did not "formally admit on the record each and every one of the allegations of the bill," as stated on page 2 of the motion to dismiss; on the contrary, they admitted only what was "not sufficiently denied in the defense they have interposed," page 69 of the record; and in their statement filed on March 20, 1903 (p. 67 of Rec.), they relieve the

complainant of proof touching any matter or thing set forth in the bill "not sufficiently denied by the defense herein." And their defense had consisted, first, of a plea in bar of the whole and every part of their bill of complaint; and, secondly, of an answer which showed conclusively that the complainant was not entitled to maintain his present bill against these appellants; and the proof was before the court, to wit, its own records. The court had only to inspect and see for itself. To state, as on page 5 of the brief supporting the motion to dismiss, that the appellants "desired such a decree as is appealed from and even went so far as to move the court below to pass such a decree" is a perversion of the record. The appellants on March 20, 1903 (p. 67 of the record), declared their desire to put the record in such shape that the court, as to them, could "make at once a final order or decree in the premises." That statement certainly did not indicate the contents of the order or decree to be made or a willingness on the part of the appellants to abide by such order or decree, and when they, later, on March 24, 1903, as found on page 69 of the record, moved the court for an order or decree in the premises, it was for an order or decree which would "end this cause and be a final determination thereof so far as the same concerns or affects the complainant and these defendants" (the appellants). Neither did that motion indicate what should be the contents of the order or decree to be made in the light of the record as it existed in that court, nor did it commit the movers to be bound by such order as should be made as the result of that motion. The proponents of that motion merely desired the court to make an order or decree which, so far as that court was concerned, should be a "final determination" of the cause. As a matter of fact that motion was overruled (p. 69 of the record). When defendants in a cause have put themselves on record with a defense which they believe to be full, complete, and thorough, and have done so twice, first in a plea and afterward in an answer, and then, be-

cause they can conceive of no better or more complete defense, elect to stand upon the record, and thereupon seek to enforce a proper consideration of their defense, they certainly are not in default, whatever phraseology may thereafter be used by the court in orders subsequently passed.

According to the proponent of this motion to dismiss, the phraseology which the lower court puts into a decree is to determine whether or not the decree is subject to review by the appellate tribunal. Though a defendant make a defense, the highest and best known to the law, yet, if the lower court should disregard the defense, or think it insufficient, and proceed as though no defense at all had been made, the appellate tribunal is without power to rectify the wrong! No whim or caprice of a judge pronouncing the decree of a court shall be reviewable, if only the precaution is taken to recite in the decree that the party against whom it goes was in default! The Supreme Court of the United States in Hovey *vs.* Elliott, 167 U. S., 409, speaks of a case where the Supreme Court of the District of Columbia struck the answer of a defendant from its files and proceeded to decree a *pro confesso*, and it declared the court to have been without jurisdiction to make the *pro confesso*.

These appellants were not in any sort of privity or relationship, or in any manner bound up in their defense with, Robert M. Moore or the Treasurer of the United States, the latter being a mere stakeholder so far as concerns this litigation. The rights of Elias Wineland and these three appellants were fully and finally adjudicated in the former suit, No. 1154 on the docket of this court, wherein Wineland, as to the same subject-matter, and against the same parties, had prayed the same relief which he now prays in the present suit, and in the former suit he was expressly refused permission to amend his bill or to have it dismissed "without prejudice," thereby, under the rules of law governing the principles of *res judicata*, becoming committed irretrievably to the result

of the former litigation, unless by bill of review or other proper procedure he could accomplish a reopening of it.

Elias Wineland came into court with this second suit without anything new to offer. Every fact set forth in the bill filed in the present suit was known to him at the time he filed his bill in the first suit; there is no pretense to the contrary —no newly discovered evidence suggested, no impeachment of the decree in the former case proposed, no issue, allegation, fact, or circumstance that could not have been presented in the former suit.

Indeed, the bill in the present suit is identical, even in phraseology, with the bill in the former suit, except that it contains some of the shifting allegations which the complainant spread before this court when he asked to be allowed either to amend his former bill or to have it dismissed "without prejudice." There being nothing in the proposed allegations which, if true, could affect the result of the litigation, this court refused to authorize further proceedings between the parties and made the dismissal absolute, thereby conclusively binding the complainant, Wineland, to the former adjudication; but instead of having respect for the former decision, Wineland, through his attorney, utterly ignoring all proceedings in the former case, coolly exhibited against these appellants the original bill on which the decree of April 7, 1903, now before this court, rests—a bill in every essential respect identical with the bill in the former case; and this appeal is an endeavor to procure respect for the decree of June 9, 1902, which was entered under the mandate of this court in the former case.

It is respectfully submitted that the motion herein made to dismiss or affirm this appeal should be denied.

J. ALTHEUS JOHNSON,
ELLWOOD O. WAGENHURST,
For the Appellants.

IN THE

Court of Appeals of the District of Columbia.

APRIL TERM, 1903.

ELLWOOD O. WAGENHURST ET AL., *Appellants,*
v.
ELIAS WINELAND, *Appellee.*
No. 1310.

MOTION TO RETAX COSTS.

Comes here now the appellee, Elias Wineland, by Mr. Thomas M. Fields, his solicitor, and moves the court to retax the costs of this appeal against the appellants, for the reasons stated in the *memorandum* filed herewith.

THOMAS M. FIELDS,
Solicitor for Appellee.

The appellants will take notice that the foregoing motion and the memorandum in support thereof will be submitted to the court before July 14, 1903.

THOMAS M. FIELDS,
Solicitor for Appellee.

Service of copies of the above motion and the memorandum in support thereof are acknowledged hereby this 6th day of July, 1903.

J. ALTHEUS JOHNSON,
Solicitor for Appellants.

MEMORANDUM.

The costs of this appeal should be paid by the appellants, because this court holds that their answer was fatally defective. This defect led to the decree appealed from, and the reversal and remand is to enable them to correct their own error in the court below. This they should not be permitted to do at the appellee's cost.

The only question before this court was whether the answer was sufficient or not. The principal exception to it—failure to exhibit the former record—is fully sustained by this court upon the authority of Bank *v.* Beverly, 1 How. 134. That the other exceptions are not sustained is immaterial, because that which is sustained fatally affects the whole answer. "When the decree of the circuit court, sustaining the plaintiff's exceptions to the answer, and (because the defendants declined to plead further) granting to plaintiffs the relief prayed for in the bill, was reversed by this court, *the only question which was or could be decided by this court, upon the record before it, was that the answer was sufficient.*"

Re Sandford, 160 U. S. 247.

In this case this court holds the answer insufficient because fatally defective in the respect stated above, but, upon general principles of justice, nevertheless reverses

the decree and remands the cause so as to allow the appellants to amend their answer, *but at the appellee's expense.*

This vital defect in the answer was expressly pointed out by the exceptions (R. 52, 53). The appellants nevertheless expressly refused to submit to this or any other exception or "*to amend their answer*" (R. 55), on February 5, 1903. This refusal was impliedly reiterated by their motion to dismiss of March 11, 1903 (R. 62). It was expressly repeated by them by their waiver of March 20, 1903 (R. 67), and again by their motion of March 24, 1903 (R. 69). The order (R. 66) sustaining the exceptions gave them full opportunity to amend their answer. The rules of the court below (Equity Rules 57 and 58, quoted on page 9 of appellee's brief) also gave them ample opportunity to amend their answer. Yet, in the face of all these things, they persistently refused to amend a fatal defect in their answer, which was most apparent and most specifically called to their attention and that of the court below, and which has always been insisted upon by the appellee both in this court and the court below, with a view to its correction by proper amendment, which the appellants expressly declined to make, refusing for one moment to entertain the idea that they could possibly make or had made any mistake in their answer.

Had the appellants amended their answer in the court below as this court holds they should have done, the final decree *pro confesso* could not have been passed, and this appeal could not have been taken. The decree therefore resulted solely from their own error. As this court holds the answer fatally defective in substance, and that one of the exceptions to it for insufficiency in substance was well taken, it necessarily follows that the decree appealed from was right, upon this record; and this is the

conclusion to be drawn from the opinion. The reversal is not for any errors in the decree itself or in the appellee's case, but because of the appellant's own fatal error, which this court now allows them to correct by amendments in the court below, notwithstanding their repeated refusals in that court so to amend.

So far as the cases go, it is confidently submitted that whenever the appellate court reverses and remands for amendments and further proceedings upon general principles of justice in order to allow an appellant to correct his own errors, as has been done in this case, the appellant will not be allowed the costs of his appeal. The reason is obvious. In this case, what has the appellee to correct? Clearly, nothing. It is the fatal defect in the appellant's answer which alone has caused this whole case an appeal.

The reversal and remand here made are upon the principles stated in and the authority of the case of Wiggins Ferry Co. *v.* O. & M. R. Co., 142 U. S. 396, cited in the opinion of the learned Chief Justice in this case. But in that case (p. 416) the court said:

> "We think the decree should be reversed, *but without costs*, and the case remanded for such further proceedings as may be consonant with justice and in conformity to this opinion."
>
> Wiggins Ferry Co. *v.* O. & M. R. Co., 142 U. S. 396, 416.

> "In order to afford relief for the rents and profits, it is further ordered and decreed that the decree of the said circuit court dismissing the bill is hereby opened, and that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein, according to law and justice, and in conformity to the

decree of this court. And it is further ordered *that each party pay his own costs in this court.*"

Watts *v.* Waddle, 6 Pet. 390, 403 (cited with approval in Wiggins Ferry Co. *v.* O. & M. R. Co., 142 U. S. 396).

"We think in this case the bill ought not to be dismissed *unless the plaintiff decline to amend as suggested.* We shall, therefore, reverse the decree dismissing the bill and remand the cause that the plaintiff (appellant) may obtain leave to amend the bill within such reasonable time as the court may designate for that purpose; or, upon failure so to amend, that the bill stand dismissed. *The appellant to pay cost of the appeal.*"

Brick Co. *v.* Atkinson, 16 App. D. C. 462 (1900), per Alvey, Ch. J.

Certainly the same rule as to payment of the cost of appeal by the appellants should be applied in this case.

So, in Palmer *v.* Fleming, 5 App. D. C. 365, this court refused to tax certain costs against the appellee, although the decree was substantially modified on appeal.

Again, the appellee has ever insisted in this case that by far the greater part of the record brought into this court was plainly unnecessary (see p. 18 of appellee's brief in support of motion to dismiss or affirm, and p. 30 of his brief upon the merits). The opinion of this court clearly shows that this objection was well taken. Hence, the hardship of compelling the appellee to pay the costs of this appeal (amounting to about $200) becomes still greater.

Both by the rules and decisions of this court, a successful appellant will be refused the costs of matter unnecessarily included by him in the record on appeal.

R.R. Co. *v.* Fitzgerald, 2 App. D. C. 501.

Barbour *v.* Moore, 4 App. D. C. 535.

Without further prolonging the argument the appellee respectfully submits that the costs of this appeal should be retaxed against the appellants.

THOMAS M. FIELDS,
Solicitor for Appellee.

WASHINGTON, D. C., *July*, 1903.